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IN THE

## Supreme Court of the United States

SHAK, JR., CLERK

OCTOBER TERM, 1977

No. \_\_\_\_\_

77-1258

STATE OF MINNESOTA, BY WARREN SPANNAUS,  
ITS ATTORNEY GENERAL,*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION and  
THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,*Respondents.*PETITION OF THE STATE OF MINNESOTA  
FOR A WRIT OF CERTIORARI TO THE  
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STATE OF MINNESOTA, BY WARREN SPANNAUS,  
ITS ATTORNEY GENERAL,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION and  
THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
*Respondents.*

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**PETITION OF THE STATE OF MINNESOTA  
FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA**

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The State of Minnesota prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Minnesota which was entered in the above-entitled case on December 14, 1977, invalidating on federal supremacy grounds Minnesota's interest limits on bank credit card accounts as applied to national banks from other states which solicit business in Minnesota.

## OPINION BELOW

The unreported decision of the state district court (App-24)<sup>1</sup> the opinion of the Minnesota Supreme Court, — Minn. — (App. 1), and the order denying rehearing in the Minnesota Supreme Court, — Minn. — (App. 18), are appended to this petition.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) to review the judgment of the Minnesota Supreme Court entered on December 14, 1977 (App. 19). Judgment was entered pursuant to the Court's Order of December 8, 1977, denying the petition for rehearing of the Marquette National Bank of Minneapolis.

## QUESTION PRESENTED FOR REVIEW

Does 12 U.S.C. §85 of the National Bank Act preempt the 12% annual interest limit on open-end credit accounts imposed by Minn. Stat. §48.185 (1976), and thereby permit respondent First of Omaha Service Corporation and its parent company, the First National Bank of Omaha, to charge customers which it has solicited in Minnesota the 18% annual interest rate allowed by Nebraska law?

<sup>1</sup> "App" refers to the Appendix at the back of this petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the supremacy clause, Article VI, Clause 2, of the United States Constitution, which states in pertinent part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The pertinent statutory provisions are:

12 U.S.C. § 85 (App. 40); and  
Minn. Stat. §48.185 (1976) (App. 41).

## STATEMENT OF THE CASE

The State of Minnesota, by its Attorney General, and the Marquette National Bank of Minneapolis (hereinafter "Marquette") are the petitioners in this action. Marquette is a national bank located in Minnesota which operates a BankAmericard bank credit card program. Respondent First of Omaha Service Corporation (hereinafter "Service Corporation") is a wholly-owned subsidiary of the First National Bank of Omaha (hereinafter "Omaha Bank"), a national bank located in Nebraska. The Omaha Bank also operates a BankAmericard bank credit card program, and its Service Corporation solicited Minnesota residents for the program until enjoined by the district court below.



Petitioner Marquette commenced this action in May, 1976, to enjoin the Service Corporation and the Omaha Bank from further solicitation of Minnesota residents and from charging Minnesota residents already enrolled in the Omaha Bank's bank credit card program interest at the Nebraska rate of 18% per annum in violation of the Minnesota maximum interest rate of 12% per annum. Minn. Stat. §48.185 (1976) limits the Omaha Bank's and the Marquette's BankAmericard programs within Minnesota to a maximum charge of 12% per annum on unpaid account balances. The Service Corporation maintained that Minn. Stat. §48.185 (1976) is preempted by 12 U.S.C. §85 which authorizes an out-of-state national bank operating a bank credit card program in Minnesota to charge either the Minnesota rate permitted under section 48.185 or the applicable interest rate of its home state, whichever is higher. The State of Minnesota became an intervenor in this proceeding since a state law (section 48.185) was under constitutional attack by the Service Corporation.

On December 22, 1976, the state district court rejected the preemption claim and temporarily enjoined the Service Corporation from violating section 48.185. A permanent injunction was entered on February 18, 1977. The Service Corporation then appealed to the Minnesota Supreme Court. On November 10, 1977, the Minnesota Supreme Court with three justices dissenting reluctantly reversed the district court, holding that the Omaha Bank should be allowed to assess its Minnesota customers the higher of the Minnesota or Nebraska rates. This ruling leaves an out-of-state national bank free to charge a higher interest rate to Minnesota customers than that allowed a state or national bank located in Minnesota. In its decision, the Minnesota Supreme Court acknowledged that this advantage "appears to be contrary to the original pur-

pose in adopting this particular section [section 85] of the National Bank Act." *Marquette National Bank v. First of Omaha Service Corporation*, — Minn. —. (App. 1). However, the Court felt constrained to reach the decision it did by the decision of the 8th Circuit Court of Appeals in *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977).

## REASONS FOR GRANTING THE WRIT

1. **The Eighth Circuit Decision Upon Which The Minnesota Supreme Court Relied Is Surely Erroneous Since It Ignored The Legislative History Of Section 85 And Reached A Conclusion Contrary To Congress' Probable Intent.**

*Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977), held that a national bank has authority under section 85 to charge interest rates permitted by the laws of the state in which it is located when making loans in other states. 12 U.S.C. §85 provides in pertinent part:

Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

The Eighth Circuit offered no explanation of its holding that section 85 allows a national bank to export the interest rates of its home state. It simply concurred in the Seventh Circuit's ruling in *Fisher v. First National Bank of Chicago*, 538 F.2d

1284 (7th Cir. 1976), cert. denied 429 U.S. 1062 (1977), without comment. *Id.*, 548 F.2d at 258.<sup>2</sup>

The Seventh Circuit had based its decision on the "plain meaning" of section 85:

We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on "any loan" is governed by the rate allowed by the state "where the bank is located."

*Fisher v. First National Bank of Chicago*, 538 F.2d 1284, 1290-1291 (7th Cir. 1976).<sup>3</sup> Reliance on the "plain meaning" of a federal statute to the exclusion of legislative history has been sharply criticized by this Court. *Train v. Colorado Pub. Int.*

<sup>2</sup> This cursory treatment might be explained by the presence of an alternative ground for the decision. The district court had ruled, on choice of law grounds, that Nebraska interest rates controlled, and the Eighth Circuit affirmed that ruling. *Fisher v. First National Bank of Omaha*, 548 F.2d 255, 256-257 (8th Cir. 1977).

<sup>3</sup> The Seventh Circuit offered the following observation as a supplement to its plain meaning construction:

After *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1873) was decided the exception was amended by Congress to apply it not only to associations "organized in any such State," which would be redundant inasmuch as the first clause applies to the same state, that is, where the bank is located, but to apply the exception also to associations "organized or existing in any such State." In this case the defendant bank appears to "exist" in Iowa, although in our view of the case we need not determine whether it does or not.

*Fisher v. First National Bank of Chicago*, 538 F.2d 1284, 1291 (7th Cir. 1976) (footnote omitted). The Seventh Circuit interpreted the words "or existing" as supporting its conclusion that an out-of-state national bank could export its home state interest rates. An argument of equal force can be made that the plain meaning of the "or existing" phrase is that the national bank transacting business in another state is governed by the interest rates of the place of transaction. The difficulty of "plain meaning" construction of this antiquated language is evident in the "redundancy" found by the court. In fact, there is no redundancy because the first clause guarantees a national bank equality under the general interest rate of a state and the exception guarantees equality with any special interest rate allowed state chartered banks. These two clauses state the "most favored lender" status of national banks which was affirmed in *Tiffany*.

*Research Group*, 426 U.S. 1 (1976), reversed the Tenth Circuit's interpretation of the phrase "radioactive materials" under the Federal Water Pollution Control Act Amendments of 1972.

The Court observed:

To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

*Train v. Colorado Pub. Int. Research Group*, *supra*, 426 U.S. at 9-10 (citations omitted). Had not the Seventh Circuit taken a superficial plain meaning approach to construing section 85, it would have discovered that its conclusion is inconsistent with Congress' probable intention.

The precise matter at issue in this case—a loan made by a national bank outside its home state—was not specifically addressed in the Congressional debates of 1864 which led to the adoption of section 85. Such debate is not to be found because ". . . at the time the 1864 Act was passed, the activities of a national bank were restricted to one particular location." *Citizens & Southern National Bank v. Bougas*, — U.S. —, 98 S.Ct. 88, 93 (1977). However, the issues that were specifically debated demonstrate that Congress would have intended loans made by a national bank outside its home state to be governed by the interest rates of the state in which the loan was made.

The remarks of various senators on both sides of the principal debate in the Senate concerning section 85 indicate that



none of them would have favored a national bank's exportation of its home state's interest rates to another state. To the contrary, the clear implication of their remarks is that section 85 should incorporate the law of the state in which the loan is made. For example, Senator Sherman from Ohio,<sup>4</sup> a principal supporter of the development of a strong national banking system, commented:

My own preference, however, as I have already stated, is to establish a uniform rate of interest by our law; but having been overruled on that point, *I prefer now to place the national banks in each State on precisely the same footing with individuals and persons doing business in the State by its laws.*

Cong. Globe, 38th Cong., 1st Sess. 2123, 2126 (1864) (emphasis added). The implication of these remarks in the present context is that national banks doing business in a state, whether it is their home state or not, should be permitted to charge the interest rates individuals and other persons doing business in that state are permitted to charge. Senator Trumbull from Illinois, who favored allowing national banks the highest interest rate permitted in a state, stated:

*This provision [section 85] of the bill is not an interference with the States, but on the other hand an agreement with the States. It allows the same rate of interest in a state which is allowed by the laws of the State.*

I think, if any good is to arise from these banking institutions [national banks], the law should be so formed that they may be established in all parts of the country;

<sup>4</sup> The legislative skirmish over the National Bank Act of 1864 and the prominent role played by Senator Sherman are explained in *First National Bank in Mena v. Nowlin*, 509 F.2d 872, 880-881 (8th Cir., 1975) (See particularly footnote 18 therein).

*and it is no interference with State authorities, or with the authority of the different states to control this rate of interest. The State of Kansas may do it or the State of Iowa, or the State of Illinois, or any state, and there can be no complaint by the people of these States if it is left to the control of their legislatures. . . .*

Cong. Globe, *supra*, at 2124 (emphasis added). Senator Trumbull's remarks stress the rights of the individual states to establish non-discriminatory interest rates free from federal interference. Senator Trumbull's remarks suggest that national banks are to be treated evenhandedly under the laws of the states in which they do business. If the interpretation of section 85 adopted below were to stand, a national bank from outside a state could import a different rate of interest from that which is allowed by the laws of that state.<sup>5</sup> Such an exemption for an out-of-state national bank would clearly constitute federal interference with the laws of that state. It would also give rise to a distinction between local and out-of-state national banks that is contrary to the Congressional objective of competitive equality. No Congressional policy can be conceived which justifies this distinction. As Justice Scott of the Minnesota Supreme Court noted in his dissent below:

The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have more

<sup>5</sup> Opposing Sherman and Trumbull were a group of Senators who favored strict parity between national banks and state banks. This group would naturally have opposed the concept that a national bank could charge the interest rate allowed in its home state when doing business in another state with lower interest limits for its state banks. See, for example, comments of Senator Henderson of Missouri and Senator Dolittle of Wisconsin. Cong. Globe, 38th Cong., 1st Sess. 2126 (1864).



avored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act.

*Marquette National Bank v. First of Omaha Service Corporation*, — Minn. — (Scott, J. dissenting) (App. 1).

In relying on its "plain meaning" construction, the Seventh Circuit rejected without analysis the one case which had examined the legislative intent behind section 85, *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969). That decision held that a national bank is governed by the usury laws of the state in which the transaction takes place. It set forth this thoughtful discussion of the scope and purpose of section 85:

We do not think Congress intended this provision to serve as a haven for national banks which, located in states with little or no restrictions as to the interest rate, charge interest on loans made in other states in excess of that allowed by the laws of those states. This, too, would frustrate the congressional purpose of the equality between national and state banks regarding the interest rate.

It might be suggested that had Congress intended this result, it could have readily been more explicit. The statute, however, was passed in 1864, over one hundred years ago, and we cannot believe that Congress foresaw, at that time, the financial fluidity which exists today. At that time, it was undoubtedly most unusual for a national bank to make a loan in a state other than the state where it was located. Even today, while it is not unusual, banks are hesitant to do so.

*Meadow Brook*, *supra*, 302 F. Supp. at 74.

Thus, neither the Minnesota Supreme Court, the Eighth Circuit or the Seventh Circuit have explored the legislative history of section 85. An examination of legislative history is essential to an understanding of the federal policy governing national banks and the relationship between that policy and the remaining areas of state regulation. This case involves an important question of the division of power between the federal government and the states which has not been addressed by this Court or adequately examined by any appellate court. Therefore, review by this Court is appropriate under Supreme Court Rule 19(1)(a).

**2. The State of Minnesota Has A Deeply Rooted Interest In Protecting Its Citizens From Usury. The State Should Not Be Barred From This Traditional Function Unless Federal Policy Unmistakably So Requires.**

The State of Minnesota has consistently and vigorously sought to protect its citizens from oppressive rates of interest. The earliest Minnesota statutes on usury were adopted from earlier New York and English statutes. *Jordan v. Humphrey*, 31 Minn. 495, 497 (1884).<sup>6</sup> Recent sessions of the Minnesota legislature have enacted legislation dealing with consumer, agricultural, and business credit.<sup>7</sup> Likewise, the Minnesota Supreme Court articulated the strong state concern with credit

<sup>6</sup> The English and American colonial laws regulating interest rates had origins in the religious doctrine of medieval England. See 91 C.J.S. Usury § 2 (1955).

<sup>7</sup> In addition to section 48.185 at issue here, see Minn. Stat. §§ 334.01 (general usury statute amended in 1974), 334.011 (agricultural loan statute adopted in 1976), and 334.16-334.181 (consumer credit statute adopted in 1971).

regulation in expressing the extreme reluctance with which it reached its conclusion in the instant case:

A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.

*Marquette National Bank, supra*, — Minn. — (App. 1).

This Court has made clear that the states remain free to regulate national banks except insofar as such regulation might frustrate federal policy. In upholding a state prohibition on branch banking, the Court observed:

National banks are brought into existence under Federal legislation, are instrumentalities of the Federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of the state in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies, or conflict with the paramount law of the United States.

*First National Bank in St. Louis v. State of Missouri*, 263 U.S. 640, 656 (1923). Recent decisions of the Court have emphasized that preemption claims require careful analysis of state and federal policies, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), and that the two schemes of regulation should be reconciled whenever possible. *DeCanas v. Bica*, 424 U.S. 351 (1976); *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973).<sup>8</sup>

Minnesota's regulation of bank credit card interest in section 48.185 does not conflict in any manner with the federal policy of equal competitive footing for national banks. It is an appropriate state function within the system of dual regulation established by Congress and practiced for over a century. Review of the decision below should be granted to vindicate this important state concern.

<sup>8</sup> In *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973), the Court stated:

[C]onflicting law absent repealing or exclusivity provisions, should be pre-empted . . . only to the extent necessary to protect the achievement of the aims of the federal law, since the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.

## CONCLUSION

The Minnesota Supreme Court erred in construing section 85 of the National Bank Act as a bar to non-discriminatory state regulation of bank credit card interest rates charged to its citizens. Congress could not have envisioned the modern credit card system at the time of the enactment of section 85. The most reasonable inference as to Congressional intent suggests that Congress would have desired out-of-state national banks to be governed by the most favorable interest provisions allowed local national and state banks. Minn. Stat. §48.185 (1976) is an exercise of traditional state police power, consistent with the intent ascribed to Congress. In light of the important state interest in protecting the public against usurious rates and the incongruous distinction between Minnesota and out-of-state national banks resulting from the ruling below, this Court should grant certiorari and give plenary consideration to the issues raised herein.

Dated: March 10, 1978.

Respectfully submitted,

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## APPENDIX

No. 250

Hennepin County

Todd, J.

Concurring specially,

Sheran, C. J.

Dissenting, Scott, J.,

Yetka, J., Wahl, J.

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

*Respondent,*

47561 vs.

FIRST OF OMAHA SERVICE CORPORATION,

*Appellant,*

and

STATE OF MINNESOTA, intervenor,

*Respondent.*

Endorsed

Filed November 10, 1977

John McCarthy, Clerk

Minnesota Supreme Court

## SYLLABUS

A national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Reversed.

Considered and decided by the court en banc.



## OPINION

TODD, Justice.

The Marquette National Bank of Minneapolis (Marquette) sought to enjoin the First National Bank of Omaha (Omaha Bank) and its wholly-owned subsidiary, First of Omaha Service Corporation (Omaha Service) from issuing BankAmericard credit cards to the State of Minnesota. The Omaha Bank program assessed customers an annual interest rate of 18 percent on unpaid balances of less than \$1,000, to be computed upon the prior month's balance of the individual account. The Minnesota Credit Card Act (Minn. St. 48.185)<sup>1</sup> sets a maximum interest rate of 12 percent per annum with the interest charge to be based on an amount no greater than the average balance of the individual account for the prior month. As a result of procedural actions, Omaha Service remains as the only defendant, but the matter was considered as though the Omaha Bank still remained as a defendant. The district court entered judgment permanently enjoining Omaha Service from soliciting BankAmericard customers on behalf of the Omaha

<sup>1</sup> Minn. St. 48.185 provides in pertinent part: "Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

"Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

"(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank."

Bank in Minnesota in contravention of the provisions of Minn. St. 48.185. We reverse.

Prior to the hearing on the matter, the parties agreed to a stipulation of facts which provides:

"I.

"The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue \* \* \* BankAmericard credit cards to Minnesota residents who qualify for them.

"II.

"Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

"III.

"Defendant First of Omaha Service Corporation will participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. \* \* \* While participating Minnesota banks will not have the authority to issue cards or

extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

"IV.

"The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. \* \* \*

"V.

"Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant to his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

"VI.

"The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1-1/2% per month on the first \$999.99 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of \$1,000 and more for an annual percentage rate of 12%. \* \* \* [T]he finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

"VII.

"The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

## "VIII.

"The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. § 85.

## "IX.

"The plaintiff The Marquette National Bank of Minneapolis ('Marquette') is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

## "X.

"Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. \* \* \*

## "XI.

"Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition a finance charge equal to 1% per month (12% annual percentage rate). \* \* \* [T]he finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the amount is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance."

The procedural history of this case is significant. Marquette originally commenced an action in Minnesota district court against the Omaha Bank, Omaha Service, and the Credit Bureau of St. Paul, Inc., alleging violations of the Minnesota Credit Card Act (Minn. St. 48.185), and the Minnesota Deceptive Trade Practices Act (Minn. St. 325.772); and seeking money damages and injunctive relief to restrain the defendant from solicitation in Minnesota for defendant's Bank-



Americard program. Since the Omaha Bank was a national bank, the case was removed to the United States District Court for Minnesota pursuant to 28 USCA, § 1441. Marquette thereafter dismissed Omaha Bank as a party defendant, resulting in the case being remanded back to the state district court because of a lack of Federal subject matter jurisdiction.<sup>2</sup> The case then proceeded solely against Omaha Service. However, because Omaha Service's function is limited to entering into agreements with merchants and local banks, and, since it does not have control over the issuance of credit cards or establishing the rate of finance charge, the case was treated as if the Omaha Bank was still the defendant.

The district court issued a permanent injunction against Omaha Service prohibiting the "solicitation of residents of the State of Minnesota or other activity in connection with \* \* \* the operation of a bank credit card program" which violates Minn. St. 48.185. In issuing the permanent injunction, the court held that while Federal law prevents states from enacting laws which discriminate against classes of lenders, it does not preclude states from discriminating against classes of loans. The principal issue presented on appeal is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state.

National banks are regulated by the United States Congress. The amount of interest which a national bank may charge its customers is governed by 12 USCA, § 85, which provides in part:

<sup>2</sup> If Marquette had not dismissed the Omaha Bank as a party defendant, the case would have undoubtedly been transferred to the United States District Court for Nebraska since a national bank can only be sued in the forum where it is established. See, *Radzanower v. Touche Ross & Co.* 426 U. S. 148, 96 S. Ct. 1989, 48 L. ed. 2d 540 (1976).

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, *interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, \* \* \**" (Italics supplied.)

The application of this section to interstate credit transactions has been recently considered by both the Seventh and Eighth Circuit Courts of Appeals. In *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977), the court addressed a situation in which a national banking association with its principal place of business in Illinois was charging Fisher, an Iowa resident, interest on the unpaid balance of his monthly BankAmericard statement at a rate allowable in Illinois. Fisher brought an action alleging that the Illinois bank was charging usurious interest to Iowa residents under its BankAmericard program. In permitting the Illinois bank to assess Illinois interest rates to Iowa resident users of the credit card, the court of appeals stated (538 F. 2d 1289):

"\* \* \* The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois. If we could stop there and only look at the first portion of § 85, we could easily conclude that the 18% per annum rate of interest allowed by the Illinois Revolving Credit Act, Ill. Rev. Stat., ch. 74, § 4.2 (1973), governs the rate chargeable by the defendant within Illinois and anywhere else that it might do business. The language is certainly broad enough to bear that interpretation. It refers to the interest on 'any loan or discount made' as being governed by the laws of the single state where the national bank can be located.

"\* \* \* The crux of this case is what law governs when the Chicago-located national banking association does business in another state, here Iowa. \* \* \*

\* \* \* \* \*

"We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa." <sup>3</sup>

After the action against the Illinois bank was in progress, the same plaintiff brought an almost identical action against the First National Bank of Omaha, challenging its right to charge Iowa resident customers of the Omaha BankAmericard program interest rates allowable in Nebraska. In *Fisher*

<sup>3</sup> But see, *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62, 73 (E. D. La. 1969), in which the court reasoned: "In effect, 12 U.S.C. § 85 provides that a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. The question is whether this was meant to fix the rate of interest on *all* loans made by the bank or merely those loans made in that state. Admittedly, the above quoted language would seem to include all loans made by the bank and not solely those made in the state where the bank is located. \* \* \*

\* \* \* \* \*

"We hold that 12 U.S.C. § 85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state."

This reasoning was disapproved by the Seventh Circuit in *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284, 1290 (7 Cir. 1976), certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977): "We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."

v. *First National Bank of Omaha*, 548 F. 2d 255, 257 (8 Cir. 1977), the court of appeals, in denying the plaintiff's claim, stated:

"\* \* \* The question is whether under the National Bank Act we are required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa but consummated in Nebraska. \* \* \*

"\* \* \* We are persuaded, however, that it really makes no difference whether the transactions are characterized as being Nebraska transactions or whether they are characterized as Iowa transactions.

"In the very recent case of *Fisher v. First Nat'l Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

"We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allow-



able in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit. By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system.

In reaching a decision to enjoin Omaha Service and, in practical effect, the Omaha Bank from operating their Bank-Americard program in Minnesota in violation of § 48.185, the district court sought to distinguish the two Fisher cases. In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 USCA, § 85, precludes states from discriminating against lenders as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.

The particular section of the National Bank Act under consideration in this case has been in existence for over a century. Obviously, the ramifications and problems resulting from bank credit card financing could not have been considered by Congress at the time of its adoption. Furthermore, a rather

strong argument can be made that credit card financing is not purely banking business even though a bank may administer the program. The original version of the National Bank Act was enacted by Congress to protect national banks from discriminatory economic legislation by individual states in which the various national banks were located. The result of the Federal legislative efforts was to create what has commonly been referred to as a "most favored lender status" for national banks. *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 879 (8 Cir. 1975); *United Missouri Bank of Kansas v. Danforth*, 394 F. Supp. 774, 779 (W. D. Mo. 1975). In the landmark case of *Tiffany v. National Bank of Missouri*, 85 U. S. (18 Wall.) 409, 21 L. ed. 862 (1874), the laws of Missouri limited the amount of interest chargeable by banks organized under state laws to 8 percent but allowed all other persons in the state to assess a 10-percent interest charge upon credit transactions. Within this statutory scheme a national banking association organized and located in the State of Missouri charged its credit customers a 9-percent interest rate which was alleged to be usurious. In an early interpretation of virtually identical statutory language to that employed in 12 USCA, § 85, the Supreme Court held that the National Bank of Missouri could lawfully charge its customers a 10-percent interest rate and reasoned (85 U. S. [18 Wall.] 412, 21 L. ed. 683):

"\* \* \* Coupled with the general spirit of the act, and of all the legislation respecting National banks, it is controlling. It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might

be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the states allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."

The decisions reached in the Fisher cases injected a new attribute into the "most favored lender status," which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Bank Act.

However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court's order which enjoins Omaha Service from operating the Omaha Bank's BankAmericard program by charging an interest rate in violation of § 48.185. Consistent with the reasoning in the Fisher cases, the Omaha Bank may assess an interest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb. Rev. Stat. § 8-820.

Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created. A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest

of the state in protecting its citizens from excessive financing charges.

Reversed.

SHERAN, Chief Justice (concurring specially).

I agree with the result. I do not agree that the public suffers by application of the law in this case where users of credit cards now have a choice between competing suppliers.

SCOTT, Justice (dissenting).

I respectfully dissent. The original purpose of 12 USCA, § 85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was intended to put "national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders." *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 880 (8 Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The Fisher decisions and the majority of this court interpret § 85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act.

As the majority opinion states, "The decisions reached in the Fisher cases injected a new attribute into the 'most fa-

vored lender status,' which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs." Additionally, should a simple credit card transaction between a local citizen and a local merchant be construed as a bank loan by the Nebraska bank to a Minnesota citizen as Fisher proclaims without question? Minnesota should reject such an extension as a misinterpretation of the National Bank Act<sup>1</sup> and exercise its own judgment. In such matters we are not bound by the Federal circuit court cases but only by holdings of the United States Supreme Court.<sup>2</sup> E. g., *United States ex rel. Lawrence v. Woods*, 432 F. 2d 1072, 1076 (7 Cir. 1970).

I would therefore affirm the trial court's issuance of the permanent injunction against Omaha Service prohibiting the solicitation of credit card customers in Minnesota as a violation of Minn. St. 48.185.

YETKA, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

WAHL, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

<sup>1</sup> The trial court, in its order of December 22, 1976, stated: "To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

<sup>2</sup> "While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely the Supreme Court." 1B Moore, *Federal Practice*, Par. 0.402[1], p. 65 (2 ed.).



STATE OF MINNESOTA  
IN SUPREME COURT

THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

*Respondent,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,

*Appellant,*

and

STATE OF MINNESOTA, INTERVENOR,

*Respondent.*

47561

ORDER

Based upon all the files, records, and proceedings herein,  
IT IS HEREBY ORDERED that

1. The petition of respondent Marquette National Bank of Minneapolis for rehearing is denied.

2. The original opinion is amended by deleting therefrom the following language appearing on page 8 of the court's opinion, to-wit:

"By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system."

3. Respondent Marquette National Bank is herewith granted a stay of judgment pending application for writ of certiorari to the United States Supreme Court. The stay is conditioned upon the filing of a bond in the amount of \$10,000 with this court, approved by one of the justices of this court. The stay is further conditioned that if Marquette National

Bank fails to make application for writ of certiorari with the United States Supreme Court within the time period allotted therefor or fails to obtain an order granting its application or fails to make its plea good in the United States Supreme Court, it shall answer for all damages and costs which the appellant First of Omaha Service Corporation may sustain by reason of the stay.

Dated: December 8, 1977.

By the Court

Associate Justice

STATE OF MINNESOTA  
SUPREME COURT

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

*Respondent,*

vs. 47561

FIRST OF OMAHA SERVICE CORPORATION,

*Appellant,*

and

STATE OF MINNESOTA, INTERVENOR,

*Respondent.*

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order and judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellant herein, do have and recover of respondent The Marquette Na-



tional Bank of Minneapolis herein the sum and amount of Ninety-Four and no/100 Dollars, (\$94.00) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed December 14, 1977.

By the Court:

Attest: John McCarthy

John McCarthy, Clerk

### STATEMENT FOR JUDGMENT

Statutory Costs \$25.00 Printer \$44.00 Clerk \$20.00

Acknowledgements: Return \$5.00 Postage and

Express \$ Appeal Bond \$ Transcript \$

Total \$94.00

Satisfaction of Judgment filed

Therefore the above judgment is duly satisfied in full and discharged of record.

Attest:

Clerk.

By

Deputy.

Supreme Court

State of Minnesota—ss.

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, March 7, 1978. — John McCarthy, Clerk. By Wayne Tschimperle, Deputy.

STATE OF MINNESOTA

County of Hennepin

DISTRICT COURT

Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

*Plaintiff,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
and CREDIT BUREAU OF ST. PAUL, INC.,

*Defendants.*

### TEMPORARY RESTRAINING ORDER

Upon the Application for Temporary Restraining Order and the verified Complaint of plaintiff, The Marquette National Bank of Minneapolis, the Affidavit of John Troyer, and all the files and proceedings herein,

IT IS HEREBY ORDERED that upon the filing of a Bond by the plaintiff, in the amount of \$10,000.00 approved by this Court, defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, shall refrain from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185 until the further order of this Court.

Let this Order be served upon the said defendant, First of Omaha Service Corporation, by serving a copy of same upon Clay R. Moore, attorney for defendant First of Omaha Service

Corporation, 1000 First National Bank Building, Minneapolis, Minnesota 55402.

Dated: December 22, 1976.

By the Court:

RICHARD J. KANTOROWICZ

Judge of District Court

# MEMORANDUM

Plaintiff, a bank chartered under the National Banking Act in the State of Minnesota, brings this motion for a temporary restraining order forbidding defendants from soliciting Bank-Americard customers and charging an interest rate greater than allowed by Minnesota Statute 48.185. Defendants are soliciting on behalf of the First National Bank of Omaha, Nebraska.

It appears that under Minnesota Law 48.185, Minnesota banks may extend loans to credit card customers at a rate not to exceed 12% (1% per month) per annum; but allows a \$15.00 per year service charge to be assessed for each cardholder. Plaintiff charges only a \$10.00 fee.

Defendants contend that they enjoy the privilege of a National Bank and that 12 U.S.C. §85 allows them to charge the interest rate of the state where they are located; that being 18% per annum, the rate allowed under Nebraska law.

This court finds no case cited by defendant which allows a national bank to charge an interest rate greater than the highest legal interest rate charged in the state where it operates. Defendants claim that the case of *Fisher v. First National Bank*, 538 F.2d 1284 (1976), supports their position. The decision there, in effect, follows the previous law which is to apply the most favored lending rate to national banks doing business in the state.

Although the parties argue pre-emption, none of the cases deal with this problem as a pre-emption problem. In fact, most of the cases talk in terms of most favored lending rate. Most favored lending rate is the rate given to any lender in the state, even though the maximum rate allowed a state bank is lower. In some limited cases, the national bank is able to charge a higher interest rate than a state bank.

No court has allowed a state with a high interest rate to export that high rate to another state. Such a result would be unconscionable. For a hundred years Congress has allowed states to set their own interest rates. The only prohibition has been that states could not discriminate against national banks, by limiting them to the interest charges of a state bank, if that state bank interest is less than individuals or other associations are allowed to charge. This is the so-called, most favored lender theory.

"The question whether there has been a pre-emption in a given field is always one of legislative intent." *State v. Barberian*, Rhode Island, (1965) 214 A.2d 465.

To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.

Because this matter comes on as a motion for a Temporary Restraining Order, there may be further facts that may affect the court's decision. It is therefore necessary to take testimony. In view of the fact defendants are claiming a Minnesota law is unconstitutional as to them, the Attorney General should be notified and be given leave to intervene.

Upon Plaintiff's filing a bond of \$10,000, the Temporary Restraining Order is granted.

R.J.K.

State of Minnesota  
County of Hennepin

District Court  
Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

*Plaintiff,*

vs.

FIRST OF OMAHA SERVICE CORPORATION  
and CREDIT BUREAU OF ST. PAUL, INC.,

*Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER FOR PARTIAL SUMMARY JUDGMENT

The above-entitled matter was heard by the Court on January 7, 1977, on the Motion of plaintiff for Partial Summary Judgement for Temporary Injunction, and presented to the Court upon a Stipulation of Facts by the parties, Affidavit of Dale Harris, and all the files, records and proceedings herein. John Troyer and J. Patrick McDavitt of Levitt, Palmer, Bowen, Bearmon & Rotman appeared on behalf of plaintiff The Marquette National Bank of Minneapolis; Clay R. Moore of Mackall, Crounse & Moore appeared on behalf of defendant First of Omaha Service Corporation; and Rod McKenzie from the Office of the Attorney General appeared on behalf of Intervenor State of Minnesota.

Based upon the foregoing Motion, papers, files and arguments presented, the Court now enters the following Findings

of Fact, Conclusions of Law and Order for Partial Summary Judgment:

FINDINGS OF FACT

I

The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card-issuing member in the BankAmericard plan, and as such has issued (prior to the entry of this Court's December 22, 1976 Temporary Restraining Order) and intends to issue (unless further enjoined) BankAmericard credit cards to Minnesota residents who qualify for them.

II

Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska, but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III below.

III

Defendant First of Omaha Service Corporation intends to participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern



the participation of those merchants and banks in the system. While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the Bank Americard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

## IV

The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks.

## V

Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant in his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

## VI

The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1 1/2 percent per month on the first \$999.99 of the customer's account for an annual percentage rate of 18 percent, and 1 percent a month on amounts of \$1,000 and more for an annual percentage rate of 12 percent. The finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchase portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

## VII

The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

## VIII

The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraphs III and IV above in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates would be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI above. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Sections 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 21 (L.B. No. 52), as amended, and other laws of Nebraska which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. §85.

## IX

Plaintiff The Marquette National Bank of Minneapolis ("Marquette") is asking for a temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

## X

Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them.

## XI

Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition, a finance charge equal to 1 percent per month (12 percent annual percentage rate). The finance charge of 1 percent per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's account during each monthly billing cycle; except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance.

## XII

The First National Bank of Omaha's BankAmericard program as conducted and operated in the manner described above, has resulted and will continue to result in competitive injury to The Marquette National Bank of Minneapolis and its BankAmericard program. The First National Bank of Omaha is able to offer the aforesaid BankAmericard program to Minnesota residents without a membership fee, and thereby induce customers away from Marquette, only because of the imposition and collection of finance charges of 1 1/2 percent per month from First National Bank of Omaha's BankAmericard holders in Minnesota.

## CONCLUSIONS OF LAW

## I

Nothing contained in the National Bank Act, 12 U.S.C. §85, precludes or preempts the application and enforcement of Min-

nesota Statutes, §48.185 to the First National Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota.

## II

The laws of the State of Minnesota, not the laws of the State of Nebraska, apply in determining the rate of interest permitted to be charged and collected by the First National Bank of Omaha from BankAmericard holders residing in the State of Minnesota.

## III

The First National Bank of Omaha's BankAmericard program, as offered and operated in the State of Minnesota, is in violation of Minnesota Statutes, §48.185, in that it provides for the collection of a periodic rate of finance charge in excess of 1 percent per month.

## IV

As agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha, has violated and threatens to continue to violate Minnesota Statutes, §48.185.

## V

The Marquette National Bank of Minneapolis, as a bank extending credit in compliance with Minnesota Statutes, §48.185, which has and will be injured competitively by viola-

tions of this statute, is entitled to a permanent injunction prohibiting any continued violation of said statute.

## ORDER FOR PARTIAL SUMMARY JUDGMENT

There being no genuine issue as to any material fact, the Court does hereby order that, pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, judgment be entered in favor of The Marquette National Bank of Minneapolis and against defendant First of Omaha Service Corporation permanently enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

The Court expressly determines under Rule 54.02 of the Minnesota Rules of Civil Procedure that there is no just reason for delay for the entry of said judgment and that it be entered by the Clerk accordingly.

Dated: February 18th, 1977.

RICHARD J. KANTOROWICZ  
Judge of District Court

## MEMORANDUM

Plaintiff is a bank chartered under the National Banking Laws located in the State of Minnesota and brings this action for a permanent injunction restraining the defendants from soliciting BankAmericard customers in the State of Minnesota in violation of Minnesota Statutes 48.185. Defendant, First of Omaha Service Corporation, is the soliciting agent for the First National Bank of Omaha. Under the arrangement, the First of Omaha Service Corporation will merely solicit customers. The loans and credit will be extended by the First Na-



tional Bank of Omaha. Because the First National Bank of Omaha will not be soliciting customers in the State of Minnesota, they have not been joined as defendants at this stage of the proceedings.

Defendants are taking the position that First National Bank of Omaha, being chartered under the National Banking Act, enjoys all of the rights and privileges granted under that law and they may solicit business through its agents in Minnesota, offering interest rates which the First National Bank of Omaha could legally charge Minnesota residents.

The issue in this case is what is the legal rate of interest that the First National Bank of Omaha may charge Minnesota residents who subscribe to the BankAmericard plan offered by the First National Bank of Omaha.

The relevant provision of the National Banking Law is found in 12 U.S.C. §85.

"Any association (national bank) may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of State, Territory, or District where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for Banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

Under that provision of 12 U.S.C. §85, the United States Court, in 1873 (*Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409), evolved what became known as "most favored lender" doctrine. This doctrine provides that a national bank doing business in a state where it is not located may charge the highest rate of interest for that type of loan allowed by

that state regardless of the type of lender. In other words, even though the state banks in that state were limited; a national bank could charge a higher rate if an individual person could charge a higher rate. The "most favored lender" doctrine was subsequently embodied in a regulation issued by the Comptroller of Currency in 12 C.F.R. §7.7310.

**"CHARGING INTEREST AT RATES PERMITTED  
COMPETING INSTITUTIONS; CHARGING INTEREST  
TO CORPORATE BORROWERS.**

(a) A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed.

(b) A national bank located in a State the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower."

Minnesota, by Minnesota Statute 48.185, has set up credit card loans as a separate loan entity and provides that a credit card customer may be charged a \$15.00 annual service charge but shall not be charged a rate of interest in excess of 12% per annum (1% per month). The plaintiff in this case issues BankAmericard credit cards pursuant to a franchise it has with the National BankAmericard Company. However, it charges only a \$10.00 fee as a one year service charge.

Defendants claim that under 12 U.S.C. §85, they are permitted to charge Minnesota residents the interest rate allowed by Nebraska Law, the state where First National Bank of Omaha is located. The Nebraska rate for credit card transactions would be 18% per annum or one and one half percent per month. Defendants propose to issue BankAmericards with no yearly service charge but will be charging a rate of interest higher than allowed by Minnesota Statutes regulating credit card loans.

This Court, on December 22, 1976, issued a Temporary Restraining Order, restraining defendants from soliciting or offering a bank credit card program in the State of Minnesota, in violation of Minnesota Statutes, Section 48.185. An application was made to the Minnesota Supreme Court by defendants and the Supreme Court denied them the relief they requested and ordered them to go back to the District Court for further proceedings. This matter was heard by the Court on January 7, 1977, on stipulated facts. It was further stipulated that this was to be a trial on the merits for a permanent injunction. Defendants rely on a number of arguments, some of which can be disposed of, without great discussion.

First of all, defendants argue that their interest rate is not higher than allowed under Minnesota Statutes because of the allowable \$15.00 annual service charge. It is true that for customers who do not have very high credit card charges the \$15.00 annual fee, when added as additional interest, makes it a higher rate. The interest rate at the low end of the scale would be higher. It is clear that defendants are not interested in small borrowers, however, and they are basically interested in the large users of credit cards and are more concerned with the large borrowers of money under the credit cards, and it

is in this area that they would be violating the Minnesota Statutes. The fact that they would be de facto in compliance at the lower end of the interest scale does not help them if they are in non-compliance at the high end of the interest scale. In fact, the Court's Order of December 22, 1976, has never prohibited defendants from soliciting credit card customers. It merely prohibited them from soliciting credit card customers in violation of Minnesota Statutes 48.185. So, if defendants are not soliciting customers, it's only because they intend to charge an interest rate greater than Minnesota law allows.

Defendants make great argument about the intelligence and education of consumers in our community and how, if they, in fact, charge a higher interest rate, they could not exist in a competitive market. This flies in the face of all known facts. It is common knowledge and well documented that consumers cannot make these judgments and there has been a plethora of consumer protection laws evidencing the fact that the government must protect the consumers from complicated business practices. Minnesota Statutes 48.185 is part of our consumer protection laws and the argument that consumers can protect themselves is an argument of long, long ago.

Since the founding of our republic, congress, by its legislation, has allowed states to set their own interest rates. By their position in this case, the defendants are arguing that they have a right to export Nebraska's high interest rate into the State of Minnesota. This Court, in its Order of December 22, 1976, said:

"To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be



to preserve the financial customs of so long a standing in our Republic."

A long standing acquiescence in an interpretation of a law by the community is recognized as a powerful principal of statutory construction. See Sutherland Statutory Construction. §49.06.

"The meaning which persons affected by an act and the public at large ascribe to it may nevertheless have an important bearing on how it should be construed.

'A practical construction given a statute by the public generally, as indicated by a uniform course of conduct over a considerable period of time, and acquiesced in and approved by a public official charged with the duty of enforcing the act, is entitled to great weight in the interpretation which should be given it, in case there is any ambiguity in its meaning serious enough to raise a reasonable doubt in any fair mind.' . . ."

Defendants are claiming by citing *Fisher v. First National Bank of Omaha*, Docket No. 75-1976 (8th Cir. January 28, 1977), and *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), that the two Circuit Courts of Appeals are, in fact, allowing National Banks to export their interest rates into low interest states. A reading of those two cases by this Court does not sustain that contention. It should be pointed out that in both of the Fisher Cases, the Courts were not dealing with a statute setting a credit card rate of interest but were applying small loan rate of interest of consumer loan rate of interest because there was no credit card rate of interest in any of the states involved. Therefore, the Court in neither of the Fisher Cases was faced with a specific "credit card interest" rate, but felt it had the choice of applying other interest rates that it deemed appropriate to those situations.

Because Minnesota has a credit card interest rate this creates a different situation because 12 C.F.R. 7.7310 identifies this as "such class of loans".

In both Fisher Cases and in all cases prior thereto, the courts have unanimously agreed that 12 U.S.C. 85 does not restrict national banks to state banking laws but no court has ever been faced with the proposition that we have here interpreting "such class of loans". Up until now the courts have had the freedom of defining credit card loans any way they wished, because no statute specifically provided for credit card loans. Now defendant argues that in the face of a credit card loan rate, it may still pick any rate it so desires. This, in fact, would negate all state usury laws. In effect, it would mean that national banks located in states with no usury laws could charge unlimited interest in any state of the United States. Such a position would seem to fly in the face of the Federal Regulation 12 C.F.R. 7.7310, which embodied the most favored lender rate where the national bank cannot be restricted to class of lenders, but by Federal Regulation are restricted to "class of loans".

It is agreed that 12 U.S.C. §85 was enacted to prevent states from discriminating against national banks. Therefore, states who create a different interest rates between classes of lenders would not be allowed to restrict national banks from enjoying the highest lending interest rates regardless of what class of lender was involved.

The need for such a division is obvious in that if states permitted high interest rates to certain persons in the state and denied them to national banks, national banks could not compete on equal footing and enjoy the parity that the courts have given them.



However, when the state makes laws limiting interest rates as to types of loans, it means that no one in that state can make that loan; therefore, the national bank is no better off or no worse off, than other people within the state.

This concept is embodied in C.F.R. 7.7310, which allows a state to forbid certain classes of loans. This is obviously fair because no one in the state can make such a loan and there is no discrimination against national banks. The national bank enjoys full parity with all other lenders in the state.

The same concept was approved in *Fisher v. First National Bank of Omaha*, 8th Circuit, January 28, 1977, when that case quotes with approval the language in *Union Missouri Bank of Kansas City v. Danforth*, 394 F.Supp. 774 (W.D. Mo. 1975):

"Missouri has in effect made small loan companies licensed under that Chapter 'favored lenders' in the class of debt encompassed by the Retail Credit Sales Act. Plaintiffs, as national banks, are entitled to parity of interest charges with these lenders, notwithstanding the rates permitted to state chartered banks. To hold otherwise would be contrary to the congressional policy of assuring national banks parity with most favored state lenders and frustrate one of the primary objectives of the National Banking Act—competitive state-federal equality."

Heretofore, all of the decisions dealt with discrimination against classes of lenders. All of the cases cited by plaintiff forbid the same. However, the plain meaning of regulation 7.7310 indicates that states are allowed to discriminate as to classes of loans because everyone in the state is forbidden to make the loan and the principle of parity is not violated. Here, the State of Minnesota has set up a class of loan and designated it as a credit card rate. No one in the state is allowed

to issue credit at a more favorable rate; to allow First Bank of Omaha to charge a higher rate would violate the doctrine of parity.

The 8th Circuit Court in *Fisher v. First Bank of Omaha* interpreted *Fisher v. First National Bank of Chicago* to mean that the foreign national bank is limited with respect to the class of loans designation set by the state.

"In the very recent case of *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), it was held that under the provisions of §85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to *the same class of debt*, the bank may charge the higher of the two rates." (Italics supplied.)

We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for *the same class of loan* regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate." (Italics supplied.)

In summary, states may not discriminate between classes of lenders but may discriminate between classes of loans and because Minnesota has set a separate and distinct credit card rate, there is no loss of parity by requiring the defendants to comply with that law.

JUDGE RICHARD J. KANTOROWICZ

*12 U.S.C. § 85. Rate of interest on loans, discounts and purchases*

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located out-

side of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558.

*Minn. Stat. 48.185 OPEN END LOAN ACCOUNT ARRANGEMENTS.* Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed \$7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed \$5,000, nor shall it extend such credit for any purposes other than personal, family, or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit



pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank;

(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge shall be charged on that balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

(a) that the law of another state shall apply;

(b) that the person consents to the jurisdiction of another state; and

(c) which fixes venue;

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice



in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the requirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.

[1976 c 196 s 5]

JUL 5 1978

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 77-1258

STATE OF MINNESOTA,

*Petitioner*

v.

FIRST OF OMAHA SERVICE CORP.

No. 77-1265

MARQUETTE NATIONAL BANK OF MINNEAPOLIS

*Petitioner*

v.

FIRST OF OMAHA SERVICE CORP.

ON WRITS OF CERTIORARI TO THE  
MINNESOTA SUPREME COURT

PETITIONS FOR WRITS OF CERTIORARI  
FILED MARCH 13, 1978  
CERTIORARI GRANTED MAY 22, 1978

**APPENDIX**

(Attorneys names appear on inside front cover)

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**APPENDIX**

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**IN THE****Supreme Court of the United States**

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**OCTOBER TERM, 1978**

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**No. 77-1258****STATE OF MINNESOTA,***Petitioner***v.****FIRST OF OMAHA SERVICE CORP.**

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**No. 77-1265****MARQUETTE NATIONAL BANK OF MINNEAPOLIS***Petitioner***v.****FIRST OF OMAHA SERVICE CORP.**

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**ON WRITS OF CERTIORARI TO THE  
MINNESOTA SUPREME COURT**

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**PETITIONS FOR WRITS OF CERTIORARI****FILED MARCH 13, 1978****CERTIORARI GRANTED MAY 22, 1978**

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**RELEVANT DOCKET ENTRIES**

6-3-76 Demand For Change of Venue as of right.  
Affidavit of James W. Brehl.  
Affidavit of Bernard J. Duffy.

- 6-11-76 Motion and Petition for Removal from County District Court.  
Bond for Removal.  
Notice of Filing Petition for Removal.
- 6-14-76 Summons and Complaint.  
Plaintiff's first set of interrogatories to defendant.  
Plaintiff's dismissal without prejudice against First National Bank of Omaha.
- 6-16-76 Notice and Motion of defendant to dismiss or for more definite statement returnable 7-13-76 at 9:00 a.m.
- 6-17-76 Letter opposing change of venue filed.
- 6-18-76 Notice and Motion of plaintiff to remand the matter to County District Court.
- 6-21-76 Notice and Motion of First National Bank of Omaha.
- 6-23-76 Separate Answer and Crossclaim of Credit Bureau returnable 7-16-76 at 9:00 a.m.  
Notice and Motion of Credit Bureau for Dismissal returnable 7-16-76 at 9:00 a.m.
- 6-30-76 Notice and Motion of Credit Bureau to set aside plaintiff's dismissal of First National Bank of Omaha; if the motion for dismissal is not granted, returnable 7-16-76 at 9:00 a.m.
- 7-1-76 Affidavit of James L. Doody.
- 7-2-76 Notice and Motion of First National Bank of Omaha to dismiss complaint returnable 7-16-76 at 9:00 a.m.
- 7-7-76 Objections of defendant to plaintiff's interrogatories, First set and demand for production of documents.
- 7-8-76 Affidavit of James L. Doody.

- 7-22-76 Notice and Motion of plaintiff for preliminary injunction returnable 8-4-76 at 1:30 p.m.  
Notice and Motion of plaintiff to compel answers to interrogatories and the production of documents, and permit other discovery, returnable 8-4-76 at 1:30 p.m.  
Affidavit of Dale Harris.
- 8-4-76 Order of Court wherein plaintiff's motion to compel answers to interrogatories is denied, and all discovery, except such discovery necessary to determine jurisdiction, is stayed pending motion to dismiss or remand to County District Court.  
Notice to Counsel.
- 8-6-76 Notice of Motion and Motion of plaintiff for modification of and Exceptions to Discovery Order, returnable 8-20-76 at 9:30 a.m.
- 8-20-76 Minutes of Proceedings (Alsop, J) (Lindberg, R) motion of plaintiff to remand to District Court: argued, submitted, and taken under advisement.
- 9-16-76 Reporter's transcript of proceedings, re: Motion on 8-20-76.
- 11-19-76 Memorandum Order (Alsop, J) dated 11-18-76 that claims against Omaha Service Corp. and Credit Bureau remanded to County District Court. Notice to Counsel.
- 11-22-76 CC of Order (Alsop, J) remanding to District Court filed.
- 11-26-76 Notice of Motion and Motion to Quash Demand for Change of Venue. Brief in support of plaintiff's Motion to Quash Demand for Change of Venue and Affidavit filed.



- 12-14-76 Application for temporary restraining order. Affidavit of John Troyer filed.
- 12-22-76 Bond for Injunction filed.
- 1-4-77 Notice of Motion and Motion for Partial Summary Judgment or Temporary Injunction filed.
- 1-10-77 Stipulation of Entry of Order, Order Allowing Intervention, Complaint of Plaintiff Intervenor, and Notice of Motion and Motion to Intervene filed.
- 1-13-77 Notice of Motion and Motion, Letter filed.
- 1-21-77 Nine Affidavits filed.
- 1-25-77 Separate Answer and Crossclaim of Credit Bureau filed.
- 1-28-77 Plaintiff-Intervenor's memorandum filed.
- 2-18-77 Findings of Fact, Conclusions of Law, and Order for Judgment filed. Memorandum filed.  
Summons, Complaint, Memorandum of First of Omaha Service Corp. in Opposition to Application for Temporary Restraining Order, Affidavit of Dale Harris, Two Affidavits of Clay R. Moore and Ten letters filed.
- 2-22-77 Brief in support of plaintiff's Application for a Temporary Restraining Order filed. Original and copy of Notice of Appeal. Judgment entered and roll filed.
- 2-24-77 Copy of Notice of Appeal given to preconference screening.  
Motion to suspend rules and provide for expedited appeal filed.
- 2-25-77 Response to Motion for expedited appeal filed.
- 3-2-77 Respondent Marquette National Bank's Response to Appellant's Motion for Stay filed.

- 3-8-77 Respondent Attorney General's Answer in Opposition to Motion for Stay.
- 3-18-77 Order filed—Appellant's Motion to Stay denied; Appeal expedited and set for en banc hearing on 4-6-77 at 9:30 a.m.; Appellant's Brief served by 3-21-77; Respondent's Brief served by 4-1-77; and Appellant's Reply Brief served by 4-3-77.
- 3-11-77 Appellant's reply to Respondent's and Intervenor's Objection to Proposed Briefing Schedule filed.  
Supplement to Appellant's Reply on Motion filed.  
Appellant's Motion for Stay filed.
- 11-10-77 Opinion and Syllabus filed—reversed—Todd, J. considered and decided by the court en banc concurring specially. Sheran, C.J., Dissenting. Scott, J., Yetka, J., Wahl, J.
- 12-8-77 Order filed—Petition for rehearing denied.
- 3-10-78 Appellant's Motion to Vacate Stay of Judgment, returnable 3-18-78, filed with service 3-10-78.
- 3-17-78 Memorandum in Opposition to Motion to Vacate Stay of Judgment filed with service 3-16-78.
- 4-10-78 Order filed and Motion to Vacate Stay of Judgment denied.
- 5-30-78 Certified copy of United States Supreme Court Order granting Certiorari filed.

STATE OF MINNESOTA  
County of Hennepin

DISTRICT COURT  
Fourth Judicial District

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.

Defendants.

4-76-251

SUMMONS

The State of Minnesota to the Above-Named Defendants:

You, and each of you, are hereby summoned and required to serve upon plaintiff's attorney an Answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: May 12, 1976

LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

By JOHN TROYER

and J. PATRICK McDAVITT

Attorneys for Plaintiff

The Marquette National Bank  
of Minneapolis

500 Roanoke Building

Minneapolis, Minnesota 55402

Telephone: 339-0661

STATE OF MINNESOTA  
County of Hennepin

DISTRICT COURT  
Fourth Judicial District

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

COMPLAINT

Plaintiff brings this Complaint against the defendants above-named, and each of them, and alleges the following:

PARTIES

1. Plaintiff, The Marquette National Bank of Minneapolis (hereinafter sometimes referred to as the "Marquette Bank"), is a national banking association having its principal office in the City of Minneapolis, County of Hennepin, State of Minnesota.

2. Defendant, First National Bank of Omaha (hereinafter sometimes referred to as the "Omaha Bank"), is a national banking association doing business and located in the State of Minnesota and with its principal office in the City of Omaha, State of Nebraska.

3. Defendant, First of Omaha Service Corporation (hereinafter sometimes referred to as the "Omaha Service Corporation"), is a corporation and wholly-owned subsidiary of the Omaha Bank, organized under the laws of the State of Nebraska, qualified to do business and doing business in the State of Minnesota, and having its principal office in the City of Omaha, State of Nebraska.

4. Defendant, Credit Bureau of St. Paul, Inc. (hereinafter sometimes referred to as the "Credit Bureau"), is a corporation organized under the laws of the State of Minnesota having its principal office in the City of St. Paul, County of Ramsey, State of Minnesota.

#### CAUSES OF ACTION

##### COUNT I

5. Marquette Bank is and has been licensed since approximately 1968 by National BankAmericard, Incorporated to issue BankAmericard credit cards. Pursuant to said license, Marquette Bank has operated a BankAmericard program in the State of Minnesota for approximately the past eight years. Under this program, which is described in Marquette Bank's BankAmericard brochure attached hereto and made a part hereof as Exhibit 1, Marquette Bank, as permitted by Minnesota law, charges a membership fee of \$10 for BankAmericard credit card privileges and imposes a finance charge of 1 percent per month (an annual percentage rate of 12 percent) on the average daily balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his BankAmericard account.

6. Beginning in or about November, 1975, and continuing as of the date hereof, the Omaha Bank and Omaha Service Corporation commenced a continuous and systematic solicitation campaign in the State of Minnesota urging Minnesota residents and customers of Marquette Bank's BankAmericard program to contract with the BankAmericard program operated by the Omaha Bank and Omaha Service Corporation (hereinafter referred to as the "defendants' BankAmericard program"). In connection therewith, the Omaha Bank and Omaha Service Corporation took steps on or about November 14, 1975 to have the Omaha Service Corporation qualified to do busi-

ness in the State of Minnesota. In the course of and as part of said solicitation campaign for the defendants' BankAmericard program, the Credit Bureau has and continues to participate in said campaign as a soliciting agent on behalf of the Omaha Bank and Omaha Service Corporation in the State of Minnesota.

7. The aforesaid solicitation campaign conducted by the defendants has been and is being accomplished by various means including, without limitation, mass mailings of brochures and applications, as well as telephonic solicitation, to Minnesota residents, including existing customers of the Marquette Bank's BankAmericard program. Copies of the form of brochures disseminated by the Omaha Bank, Omaha Service Corporation, and the Credit Bureau are attached hereto and made a part hereof as Exhibit 2.

8. As a result of the dissemination of the aforesaid solicitation material by the defendants, Minnesota residents, including existing customers of Marquette Bank's BankAmericard program, have been and continue to be induced to contract with the defendants' BankAmericard program under credit terms which violate Minnesota Statutes, §48.185 (Laws of Minnesota, 1976, Chapter 196, Section 5).

9. Under the BankAmericard program operated by defendants, the Omaha Bank issues credit cards and extends credit to residents of the State of Minnesota under an open credit arrangement as described in Minnesota Statutes, §48.185; there are retail merchants and banks within the State of Minnesota that are contractually bound to honor the BankAmericard credit cards issued by the Omaha Bank; goods, services and loans are delivered or furnished to residents in the State of Minnesota through purchases made with the Bank-



Americard credit cards issued by the Omaha Bank; payment for such goods, services and loans is made by residents from the State of Minnesota; and the Omaha Bank collects a FINANCE CHARGE, from its Minnesota customers wishing to defer payment, that is: (a) at a rate which exceeds the Minnesota statutory maximum of twelve percent per month, and (b) computed on a basis which exceeds the average daily balance method authorized by the Minnesota statute.

10. The Omaha Bank's aforesaid violations of Minnesota Statutes, §48.185 have caused, and continue to cause, Marquette Bank to be injured competitively in its BankAmericard program and Marquette Bank is entitled to relief against the Omaha Bank in the form of (a) an injunction against the future solicitation of defendants' BankAmericard program in the State of Minnesota in violation of Minnesota Statutes, §48.185 and from future collections of finance charges in violation thereof; and (b) Marquette Bank's costs and attorneys' fees incurred herein.

#### COUNT II

11. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 10 inclusive of this Complaint and further states and alleges as follows:

12. By reason of their participation in the aforesaid continuous and systematic solicitation campaign in the State of Minnesota for defendants' BankAmericard program and their participation with the Omaha Bank in the operation of said BankAmericard program, the Omaha Service Corporation and the Credit Bureau, and each of them, have themselves violated, and have conspired with the Omaha Bank to violate, Minnesota Statutes, §48.185 as described in Count I hereinabove.

13. As a result of these aforesaid violations of Minnesota Statutes, §48.185, Marquette Bank has been injured, and continues to be injured, competitively in its BankAmericard program and Marquette Bank is entitled to relief against the Omaha Service Corporation and the Credit Bureau, and each of them, in the form of (a) an injunction against the future solicitation of defendants' BankAmericard program in the State of Minnesota in violation of Minnesota Statutes, §48.185 and from future collections of finance charges in violation thereof; and (b) Marquette Bank's costs and attorneys' fees incurred herein.

#### COUNT III

14. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 13 inclusive of this Complaint and further states and alleges as follows:

15. As part of the solicitation campaign conducted by the Omaha Bank, Omaha Service Corporation and the Credit Bureau in the State of Minnesota for defendants' BankAmericard program, defendants, and each of them, have been and continue to be engaged in, certain deceptive trade practices in violation of Minnesota Statutes, §325.772 (Laws of Minnesota, 1973), Chapter 216, Section 2), with said defendants having knowledge of such deceptive trade practices or a financial interest in the said services being deceptively offered for sale.

16. The solicitation brochures attached as Exhibit 2 hereto which were and are disseminated by the defendants to Minnesota residents, including existing customers of Marquette Bank's BankAmericard program represent in a misleading and deceptive manner that defendants' BankAmericard program is "FREE". Defendants' BankAmericard program is not "FREE" as proclaimed in these solicitation brochures, but

rather requires a FINANCE CHARGE OF 1 1/2 percent per month (and ANNUAL PERCENTAGE RATE of 18 percent) on the previous month's unpaid balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his credit card account, without taking into account payments on goods and services made during the billing cycle. Through their dissemination of the aforesaid misleading and deceptive solicitation material, defendants have thereby represented that defendants' BankAmericard services have certain characteristics and benefits which in fact they do not have.

17. By making the false and misleading representation of fact that defendants' BankAmericard program is "FREE", defendants have committed an unfair trade practice by disseminating solicitation material that disparages the Marquette Bank's BankAmericard program.

18. The solicitation brochures (Exhibit 2) disseminated by the defendants, as well as the other means of solicitation utilized by defendants, have not clearly identified defendants' BankAmericard program as one separate and distinct from the Marquette Bank's BankAmericard program. This failure by defendants to properly identify and designate their BankAmericard program as separate and distinct from that of the Marquette Bank has caused and is likely to cause confusion or misunderstanding as to the source, sponsorship, or approval of such service; has caused and is likely to cause confusion or misunderstanding as to affiliation, connection, or association of defendants' BankAmericard program with that of Marquette Bank; constitutes deceptive representations or designations of the geographic origin of defendants' BankAmericard program; and has otherwise caused and is likely to cause confusion or misunderstanding on the part of Minnesota residents

and the customers of Marquette Bank's BankAmericard program.

19. As a result of the aforesaid violations of Minnesota Statutes, §325.772, Marquette Bank has been injured competitively in its BankAmericard program and is entitled to relief against the defendants, and each of them, in the form of (a) an injunction against the future solicitation of the defendants' BankAmericard program in the State of Minnesota in violation of Minnesota Statutes, §325.772; and (b) Marquette Bank's costs and attorneys' fees incurred herein.

#### COUNT IV

20. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 19 inclusive of this Complaint and further states and alleges as follows:

21. Minnesota Statutes, §48.185 is designed to set forth the conditions under which banks, including national banking associations doing business in the State of Minnesota, may extend credit under a credit card plan or any other open-end credit arrangement with residents of the State of Minnesota and the conditions under which solicitation of such plans may be made either personally or by an agent or by mail. The Marquette Bank, as a bank extending credit in compliance with the provisions of said statute, is among the class of persons the statute was meant to protect.

22. Minnesota Statutes, §325.772 is designed to enumerate those trade practices that are deemed to be deceptive and unlawful if conducted within the State of Minnesota. The Marquette Bank, as one likely to be damaged by the deceptive trade practices of the defendants, is within the class of persons for whose protection this statute was adopted.



23. The defendants, and each of them, have willfully, wantonly or maliciously violated and conspired to violate, Minnesota Statutes, §§48.185 and 325.772, as described in Counts I, II and III hereinabove, directly and proximately causing substantial damage to Marquette Bank's business in connection with the latter's BankAmericard program, including, without limitation, loss of profits and prospective damages, the extent of which is yet to be determined but is thought to be at least in the amount of \$250,000.00.

#### COUNT V

24. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 23 inclusive of this Complaint and further states and alleges as follows:

25. As alleged in Counts I, II and III hereinabove, defendants have used and continue to use illegal and unfair means to interfere with and destroy Marquette Bank's advantageous contractual and other business relationships with its BankAmericard customers. This willful, wanton or malicious interference, without legal justification or lawful purpose, violates Marquette Bank's right to carry on its lawful BankAmericard program, as protected by the laws of the State of Minnesota, and Marquette Bank is entitled to damages for all past and present instances of such tortious interference by defendants. The extent of Marquette Bank's damages, including, without limitation, loss of profits and prospective damages, is yet to be determined but is thought to be at least in the amount of \$250,000.00.

26. The aforesaid acts of unfair competition and tortious interference by the defendants have caused and will continue to cause irreparable harm to the lawful conduct of Marquette Bank's BankAmericard program, for which there is no ade-

quate remedy at law. Accordingly, Marquette Bank is entitled to injunctive relief against the continuation of said acts, and more specifically against defendants' malicious efforts to illegally coerce and induce Marquette Bank's BankAmericard customers to terminate their business relationship with the Marquette Bank.

#### PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, as follows:

1. An injunction enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or cooperation with them or at their direction, from all solicitation in the State of Minnesota for defendants' BankAmericard program, until such time as defendants' program is changed (a) to conform to the requirements of Minnesota Statutes, §48.185; and (b) by omitting any direct or indirect representations that defendants' program is free; and (c) by making a part of any such solicitation a clear and prominent statement that defendants' program is the "BankAmericard plan affiliated with the First National Bank of Omaha and has no connection or association with the BankAmericard plan operated by The Marquette National Bank of Minneapolis."

2. An injunction enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or cooperation with them or at their direction, from charging or collecting any finance charges from residents of the State of Minnesota under defendants' BankAmericard program except at a FINANCE CHARGE no greater than 1 percent per month (12 percent ANNUAL PERCENTAGE RATE), which is to be computed on the basis of the average daily balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his BankAmericard account.



3. Compensatory damages in the amount of \$250,000.00 or in such other amount as the Court finds have and will be directly and proximately caused by defendants' unlawful and tortious conduct.

4. Punitive damages in the amount of \$750,000.00.

5. Plaintiff's costs and disbursements herein, including reasonable attorneys' fees.

6. Such other relief as appears to the Court to be necessary or just.

Dated: May 12, 1976.

LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

By JOHN TROYER

and J. PATRICK McDAVITT

Attorneys for Plaintiff

The Marquette National

Bank of Minneapolis

500 Roanoke Building

Minneapolis, Minnesota 55402

Telephone: 339-0661

STATE OF MINNESOTA  
COUNTY OF HENNEPIN—ss.

JACK BELL, being first duly sworn, on oath deposes and says that he is a Senior Vice President of The Marquette National Bank of Minneapolis, plaintiff in the above-entitled action, and has knowledge of the facts stated in the foregoing Complaint; that he knows the contents of the foregoing Complaint; that the averments thereof are true of his own knowledge, save as to such as are therein stated on information and belief, and as to those, he believes them to be true.

JACK BELL

Subscribed and sworn to before me this 1st day of May, 1976.—  
John Troyer, Notary Public, Minnesota, Hennepin County. My  
commission expires 1985.

(Notarial Seal)

(Exhibits attached to Complaint omitted in printing.)

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Civil 4-76-251

MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

NOTICE OF MOTION

To: Plaintiff Marquette National Bank and its attorneys  
John Troyer and J. Patrick McDavitt, Levitt, Palmer,  
Bowen, Bearmon & Rotman, 520 Roanoke Building, Minne-  
apolis, Minnesota 55402, and defendant Credit Bureau of  
St. Paul, Inc. and its attorney James W. Brehl, Maun, Hazel,  
Green, Hayes, Simon and Aretz, 332 Hamm Building, St.  
Paul, Minnesota 55102.

PLEASE TAKE NOTICE that the attached motion (which  
was served on June 10, 1976 prior to the removal of this ac-

tion to federal court) will be brought on for hearing before the Honorable Donald Alsop on the 16th day of July at 9:00 A.M. at the Federal Court Building in St. Paul, Minnesota as soon thereafter as counsel may be heard.

MACKALL, CROUNSE &  
MOORE

By CLAY R. MOORE

1000 First National Bank

Building

Minneapolis, Minnesota 55402

(612) 333-1341

Attorneys for defendant

First National Bank of

Omaha

Of Counsel:

Wm. E. Morrow, Jr.

Donald J. Buress

Swarr, May, Smith & Andersen

3535 Harney Street

Omaha, Nebraska 68131

STATE OF MINNESOTA

County of Hennepin

DISTRICT COURT

Fourth Judicial District

MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION,  
and CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

# MOTION

Comes now the defendant First National Bank of Omaha and appears specially and for the sole purpose of moving the Court pursuant to Rule 12.02(1) Minnesota Rules of Civil Procedure to dismiss plaintiff's complaint as to this defendant for the reason that this defendant is a national banking association located in Omaha, Douglas County, Nebraska; that by virtue of 12 U.S.C. §94 suit may be brought against it only in Douglas County, Nebraska; that venue, and therefore in this case jurisdiction, cannot be had over the person of this defendant in the District Court for the Fourth Judicial District, Hennepin County, Minnesota.

Dated: June 10, 1976.

MACKALL, CROUNSE &  
MOORE

By CLAY R. MOORE

1000 First National Bank

Building

Minneapolis, Minnesota 55402

(612) 333-1341

Attorneys for Defendant

First National Bank of Omaha

Of Counsel:

Wm. E. Morrow, Jr.

Donald J. Buress

Swarr, May, Smith & Andersen

3535 Harney Street

Omaha, Nebraska 68131

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

—  
Civil 4-76-251  
—

MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

—  
NOTICE OF MOTION

To: Plaintiff Marquette National Bank of Minneapolis and their attorneys, John Troyer and J. Patrick McDavitt, Levitt, Palmer, Bowen, Bearmon & Rotman, 500 Roanoke Building, Minneapolis, Minnesota 55402, and Defendants First National Bank of Omaha and First of Omaha Service Corporation, and their attorneys, Clay R. Moore and MacKall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402.

PLEASE TAKE NOTICE that the attached motion will be brought on for hearing before the Honorable Donald D. Alsop, U. S. District Judge, at 9:00 a.m. on the 16th day of July, 1976

at the Federal Court Building, St. Paul, Minnesota, or at such other time as counsel may be heard.

JAMES W. BREHL and  
MAUN, HAZEL, GREEN,  
HAYES, SIMON AND ARETZ  
332 Hamm Building  
St. Paul, Minnesota 55102  
(612) 227-9231  
Attorneys for Defendant  
Credit Bureau of St. Paul, Inc.

—  
UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

—  
Civil 4-76-251  
—

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

v.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

—  
MOTION OF CREDIT BUREAU OF ST. PAUL,  
INC. PURSUANT TO RULE 12

—  
MOTIONS

The defendant Credit Bureau of St. Paul, Inc. moves the Court for its Order as follows:



1. Dismissing the above-entitled action as to this defendant for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, or alternatively,

2. Dismissing this action pursuant to Rule 12(b)(7), Federal Rules of Civil Procedure for failure to join a party indispensable under Rule 19, and

3. Such other relief as the Court may deem appropriate under the circumstances, including, if neither of the foregoing motions is granted, the requirement of payment by plaintiff of all this defendant's costs and expenses herein, including its attorneys' fees if plaintiff proceeds with its claims against this defendant and such claims ultimately are determined to be without merit.

#### PROCEDURAL HISTORY

This action was commenced by plaintiffs in the Minnesota District Court Hennepin County, Fourth Judicial District, on May 17, 1976. On June 3, 1976 this defendant, Credit Bureau of St. Paul, Inc. served its Answer upon plaintiff, including its Crossclaims against the other defendants. On June 10, 1976 the Answer and Crossclaims were served upon those other two defendants. On June 3, 1976, this defendant demanded change of venue in the state courts to Ramsey County, Second Judicial District.

Thereafter, on June 11, 1976 the Omaha defendants petitioned for removal to Federal District Court and this defendant joined therein.

On June 15, 1976, plaintiff served a Notice of Dismissal without Prejudice as to defendant First National Bank of Omaha. On June 16, 1976, defendant First of Omaha Service Corporation moved for dismissal of the Complaint, or, alternatively, for a more definite statement. On June 17, 1976, First

National Bank of Omaha moved for dismissal of the Crossclaim against it.

#### GROUND

The purported claims for relief asserted in the Complaint designate the defendant First National Bank of Omaha as the primary defendant against whom relief is sought, and upon whom the viability of any alleged claim against the other defendants is dependent.

No separate claim for relief has been asserted against defendant Credit Bureau of St. Paul, Inc. except a generalized claim that it "conspired" with the two Omaha defendants (Count II).

Basic to all claims asserted by plaintiff in all counts of the Complaint is its allegation that there existed impropriety in First National Bank of Omaha's alleged solicitation of prospective BankAmericard customers and in finance charges announced by First National Bank of Omaha as applying to transactions which might occur under cards which might be issued by it.

The BankAmericard application form attached by plaintiff as Exhibit 2 refers only to defendant First National Bank of Omaha, without any reference to either of the other defendants. As the Complaint alleges, the claims of plaintiff arise out of the distribution of that form by First National Bank of Omaha.

In the absence of First National Bank of Omaha as a party, under Rule 19(b) in equity and good conscience this action cannot proceed and should be dismissed. Furthermore the purported voluntary dismissal by plaintiff is of questionable propriety in view of the Crossclaim by this defendant against First National Bank of Omaha served prior to plaintiff's notice as to dismissal of its claims against that defendant.

On June 17, 1976, First National of Omaha moved for dismissal of the Crossclaim, claiming that the National Banking Act, §94 (12 USC 94) places the venue of any action against a national bank in the District wherein the Bank is established. If that be the case, the joinder of First National Bank of Omaha as defendant here as an indispensable party absent the Bank's consent would not be permitted under the last sentence of Rule 19(a). Without the Bank joined, dismissal under Rule 19(b) would be required, with plaintiff compelled to reinitiate any action in Omaha.

Of equal significance, however, is the failure of the Complaint to state a claim for relief against this defendant, Credit Bureau of St. Paul, Inc. On that independent basis, the action against this defendant should be dismissed. The Complaint fails to state specific grounds for any claim against this defendant. The necessary specificity to support a claim for relief is absent to show any manner by which this defendant "conspired" (Count II), or violated Minn. Stat. §325.722 (Count III and IV), or violated Minn. Stat. §48.185 (Count II and IV) or tortuously interfered or competed with plaintiff (Count V). Count I, while alleging this defendant's participation as an agent of defendant First National Bank of Omaha, states a claim for relief only against First National Bank of Omaha.

We presume that plaintiff's effort to include Credit Bureau of St. Paul, Inc. as a defendant has been out of a desire to place its action in the Minnesota state courts. As the other defendants in their submissions to the Court have stated, this defendant is an unnecessary party. On the other hand First National Bank of Omaha is indispensable, and under Rule 19 of the Minnesota Rules of Civil Procedure (which corresponds

to the Federal Rules), its absence would compel dismissal of the action in the state court also.

JAMES W. BREHL and  
MAUN, HAZEL, GREEN,  
HAYES, SIMON AND ARETZ  
332 Hamm Building  
St. Paul, Minnesota 55102  
(612) 227-9231  
Attorneys for Defendant  
Credit Bureau of St. Paul, Inc.

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

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Civil No. 4-76-251

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THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF  
OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

---

NOTICE OF DISMISSAL  
WITHOUT PREJUDICE

To: First National Bank of Omaha and Clay R. Moore, Esq.,  
Mackall, Crounse & Moore, 1000 First National Bank Building,  
Minneapolis, Minnesota 55402, its attorneys

First of Omaha Service Corporation and Clay R. Moore, Esq., Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402, its attorneys Credit Bureau of St. Paul, Inc. and James W. Brehl, Esq. and Garret E. Mulrooney, Esq., Maun, Hazel, Green, Hayes, Simon & Aretz, 332 Hamm Building, St. Paul, Minnesota 55102, its attorneys

Notice is hereby given that the Marquette National Bank of Minneapolis, the above-named plaintiff, elects to dismiss without prejudice its actions herein against defendant First National Bank of Omaha. Said dismissal without prejudice is made pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, neither an answer nor motion for summary judgment having been served by said defendant First National Bank of Omaha.

Plaintiff's actions herein against defendants First of Omaha Service Corporation and Credit Bureau of St. Paul, Inc. remain and are not dismissed.

Dated: June 14, 1976.

Respectfully submitted,  
LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

John Troyer

J. Patrick McDavitt

Attorneys for Plaintiff

The Marquette National

Bank of Minneapolis

500 Roanoke Building

Minneapolis, Minnesota 55402

Telephone: 339-0661

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Civil No. 4-76-251

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF  
OMAHA SERVICE CORPORATION and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

NOTICE OF MOTION AND  
MOTION FOR REMAND

To: First National Bank of Omaha and First of Omaha Service Corporation, and Clay R. Moore, Esq., Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402, their attorneys Credit Bureau of St. Paul, Inc. and James W. Brehl, Esq. and Garret E. Mulrooney, Esq., Maun, Hazel, Green, Hayes, Simon & Aretz, 332 Hamm Building, St. Paul, Minnesota 55102, its attorneys

YOU WILL PLEASE TAKE NOTICE that plaintiff, The Marquette National Bank of Minneapolis, will move the above-named Court before the Honorable Donald D. Alsop in Court Room 3 at the United States Court House in the City of St. Paul, Minnesota on the 16th day of July, 1976 at 9:00 a.m. for an Order, pursuant to 28 U.S.C. §1447(e), remanding the above-entitled matter to the District Court of the State of Min-



nesota for the Fourth Judicial District, Hennepin County, Minnesota, for the following reasons and grounds:

1. The causes of action alleged by plaintiff herein are based on an originate under the statutes and common law of the State of Minnesota and do not arise under federal law as required for this Court to have removal jurisdiction under 28 U.S.C. §1441(b);

2. There is no removal jurisdiction based upon diversity of citizen under 28 U.S.C. §1441(b) because plaintiff and Credit Bureau of St. Paul, Inc., one of the parties in interest properly joined and served as a defendant, are both citizens of the State of Minnesota; and

3. The causes of action against First of Omaha Service Corporation are not "separate and independent" from the causes of action against Credit Bureau of St. Paul, Inc., within the meaning of 28 U.S.C. §1441(c), and cannot be removed from the rest of the case under 28 U.S.C. §1441(c).

Dated: June 18, 1976.

Respectfully submitted,  
LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

John Troyer

By J. Patrick McDavitt

Attorneys for Plaintiff

The Marquette National

Bank of Minneapolis

500 Roanoke Building

Minneapolis, Minnesota 55402

Telephone: 339-0661

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA,  
FOURTH DIVISION

CIVIL ACTION NO. 4-76-251

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF  
OMAHA SERVICE CORPORATION and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

AFFIDAVIT

State of Nebraska

County of Douglas—ss.

James L. Doody, being first duly sworn states upon oath that:

1. He is General Manager of First of Omaha Service Corporation and is Vice President of the First National Bank of Omaha, BankAmericard Division.

2. First of Omaha Service Corporation is a Nebraska corporation with its principal place of business in Omaha, Nebraska, and is a wholly owned subsidiary of the First National Bank of Omaha.

3. First of Omaha Service Corporation is qualified to do business in Minnesota but maintains no offices (other than its registered office c/o CT Corporation System, Inc., 405 Second Ave. S. Minneapolis, Minnesota) and has no employees in the State of Minnesota.

4. First of Omaha Service Corporation does not now and has never solicited prospective BankAmericard cardholders in

the State of Minnesota for the BankAmericard program operated by First National Bank of Omaha. Nor is First of Omaha Service Corporation a party to any agreement with the Credit Bureau of St. Paul or any other organization by which said Credit Bureau or other organization would undertake any such solicitation on its behalf. Any such agreements as do exist for purposes of soliciting prospective cardholders for the BankAmericard program operated by First National Bank of Omaha are solely between the Credit Bureau of St. Paul, Inc. and the First National Bank of Omaha.

5. The function of the First of Omaha Service Corporation in other states has been to enter into agreements with banks and merchants in the forms attached hereto as Exhibits A and B. To this date, no such agreements have been entered into with banks or merchants in the State of Minnesota.

6. The relationship between the Service Corporation and the First National Bank in the operation of the First National Bank's BankAmericard program is set forth in the agreement attached hereto as Exhibit C. The BankAmericard credit cards involved in this program are issued only by the First National Bank of Omaha based upon credit assessments made only by that Bank. The First of Omaha Service Corporation does not issue the credit cards. Any credit extended (whether by cash advance or payment of a cardholder's obligation to a merchant) is extended only by the First National Bank of Omaha (not the Service Corporation). All periodic billing statements rendered to credit card holders are prepared and rendered solely by the Bank (not the Service Corporation). All finance charges made on unpaid balances are assessed only by the Bank and the Bank alone receives and credits all payments on unpaid balances; all finance charges paid and all discount fees from participating banks and merchants are income of the Bank alone.

JAMES L. DOODY

SUBSCRIBED and sworn to before me, a Notary Public in and for said state and county, this 6th day of July, 1976.  
—Joan Karstetter, Notary Public, State of Nebraska. My commission expires April 18, 1979.

# EXHIBIT A

## AGENT BANK AGREEMENT

This agreement made and entered into between First of Omaha Service Corporation, hereinafter called Service Corporation and  
hereinafter called Bank,

WITNESSETH:

WHEREAS, Service Corporation has been licensed by National BankAmericard Incorporated to use the service marks, BankAmericard, and "Blue, White and Gold Bands", certain written material and technical information and "know-how" collectively called BankAmericard Plan, and to promote and expand the BankAmericard Plan, and credit card services thereunder, and

WHEREAS, Bank desires to offer BankAmericard services to citizens and merchants in its community, NOW THEREFORE

IT IS MUTUALLY covenanted and agreed between the parties hereto:

1. On behalf of and as agents for National BankAmericard Incorporated, Service Corporation hereby sponsors Bank for a license to use said service marks and written materials in offering credit card services, upon terms and conditions to be set forth by National BankAmericard Incorporated in granting the license. This agreement shall not take effect until the license is granted to you by National BankAmericard Incorporated.

2. National BankAmericard Incorporated is not a party

to this agreement and it has no responsibility hereunder with respect to the performance by the parties hereto of their duties and obligations.

3. Bank agrees to accept and comply with all of the terms and conditions of the licenses as set forth by National BankAmericard Incorporated.

4. This agreement will automatically terminate upon any affirmative act of insolvency by Service Corporation or Bank, or the filing by Service Corporation or Bank of any petition or action under any bankruptcy, reorganization, insolvency or moratorium law; or upon the filing of any voluntary petition under a bankruptcy statute by Service Corporation or Bank, or the appointment of any Receiver or Trustee to take possession of the properties of Service Corporation or Bank.

This agreement shall automatically terminate if the separate agreement between Service Corporation and First National Bank of Omaha is terminated or if National BankAmericard Incorporated terminates or revokes Service Corporation's license. Except for events which result in automatic termination, this agreement may not be terminated without 90 days written notice by either party from the date hereof. Provided however, Service Corporation may terminate this Agreement upon breach of any provision hereof by Bank, upon giving Bank thirty days written notice of its intention to terminate and the reasons therefore unless Bank remedies such breach within twenty days after receipt of such notice. Upon termination for any reason whatsoever, Bank shall deliver all BankAmericard materials and supplies to Service Corporation and shall make no other or further use thereof. The obligations of the parties hereto in effect at the date of termination hereof shall continue until they are fully performed or satisfied.

5. Bank will actively solicit Merchant Members for the BankAmericard Plan. Such Merchant Members will be en-

rolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. They shall be selected in accordance with quality standards to be established from time to time by Service Corporation. Service Corporation will assist Bank in soliciting and enrolling Merchant Members and may enroll Merchant Members independently of Bank.

6. Bank will assist Merchant Members in its community in the promotion and execution of the BankAmericard Plan and will maintain continuous contact with and supervision of such Merchant Members in their BankAmericard Plan operations.

7. Bank will mail applications in their regular bank mailing (demand accounts), etc., within 90 days after signing. All inserts to be furnished by Service Corporation.

8. Bank will process all sales draft deposit envelopes submitted to it by Merchant Members, ascertain that they comply with Service Corporation's instructions, and forward them through regular banking channels to First National at Omaha, Nebraska.

9. Service Corporation will supply Bank with BankAmericard forms and supplies and Bank will furnish such materials, forms, supplies and equipment to Merchant Members in its community as is required.

10. Bank will honor any valid BankAmericard properly tendered for use and will advance such amounts of cash to the holder thereof as do not exceed a dollar limitation imposed by Service Corporation. If the holder of such BankAmericard requests cash in excess of such limitation, Bank will telephone Service Corporation's authorization facility and obtain specific authorization to draw a draft in relation thereto and such authorization shall be noted by Bank in the appropriate place on the draft.



11. Service Corporation represents that First National of Omaha has agreed to accept BankAmericard Sales and Cash Advance drafts presented to it through regular banking channels and in accordance with the terms hereof at such discount as is agreed to by Service Corporation from time to time.

12. Bank agrees to purchase from Service Corporation:

a. Any cash advance draft which originated with Bank and concerning which

- i. The draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or
- ii. The draft is illegible, or
- iii. The draft is alleged to have been drawn improperly or without authority, or
- iv. The BankAmericard was invalid at the time the draft was drawn as determined by the card's format and current void lists provided by Service Corporation.

13. Service Corporation will pay to Bank as compensation for its services hereunder an amount equal to 20% of the net merchant discount on sales drafts forwarded to First National of Omaha by Merchant Members in Bank's community and \$.50 for each cash advance transaction.

14. Service Corporation will furnish Bank from time to time with advertising materials and supplies such as radio tapes, newspaper mats and copy. Service Corporation shall make available to Bank other advertising materials at a reasonable cost from time to time.

15. Bank will not use any advertisements of any description without the prior approval of Service Corporation. All materials furnished by Service Corporation shall be deemed

to be approved. Service Corporation will promptly approve or disapprove any material submitted by Bank.

16. The parties to this agreement are acting independently and nothing herein contained shall be construed to make either the agent, employee or principal of the other. Nor shall this agreement be construed as creating or establishing a partnership or a joint venture.

AGREED TO AND ACCEPTED this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

FIRST OF OMAHA SERVICE CORPORATION

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

#### EXHIBIT B

#### BANKAMERICARD MEMBER AGREEMENT

Undersigned, hereinafter called Member, whose principal place of business is ..... desires to honor BankAmericards and all other "Qualified Cards" as defined in this Agreement in connection with sales of merchandise or services, and will from time to time offer to First National Bank of Omaha, through regular banking channels, sales drafts relating to such transactions for acceptance.

1. First National Bank of Omaha is not a party to this agreement.

2. The term "Card" as used in this Agreement, and whether singular or plural, shall mean only a "Qualified Card". A "Qualified Card" is any credit card conforming to the stan-

dards established by National BankAmericard Incorporated or BankAmerica Service Corporation, which card may or may not bear the name "BankAmericard" but which must bear the Blue, White and Gold Bands Design and an embossed "BAC" on the face of the card.

3. Member represents and warrants that all statements of fact within the knowledge of Member or concerning which Member has actual or constructive notice and which are contained in applications submitted by it to First of Omaha Service Corporation, hereafter called Service Corporation, are true.

4. Member will honor any valid Card properly tendered for use. Member will check each Card for validity and currency, to be determined by the Card's format and such current void lists as are provided by Service Corporation. If the total amount of any sales transaction is in excess of a dollar limitation imposed by Service Corporation, Member will telephone Service Corporation's authorization facility and obtain specific authorization to draw a sales draft relating thereto, and such authorization shall be noted by Member in the appropriate place on the sales draft. All sales drafts, and credit vouchers will be on forms supplied by Service Corporation, and will be completed to include the name of the Card holder, his account number, the name of the authorized user, the date, a description of the merchandise sold or service rendered, and the total cash price of the sale. One copy of the sales draft (or credit voucher) will be delivered to the holder or authorized user of the Card. All sales drafts tendered to First National Bank of Omaha, by Member will represent obligations of a Card holder in amounts set forth therein for merchandise sold or services rendered only and shall not involve any element of credit for any other purpose. Member agrees to indemnify

and hold Service Corporation and First National Bank of Omaha, harmless from any claim relating to any sales draft accepted by First National Bank of Omaha or acquired by Service Corporation, interposed by way of defense, dispute, offset or counterclaim. Member represents and warrants that as of the date any sales draft is placed in regular banking channels for tender to First National Bank of Omaha, Member has no knowledge or notice that would impair the validity of the sales draft or its collectibility. Member will make no special charge nor extract any special agreement, conditions or security from a Card holder in connection with any sales draft.

5. Member will establish a fair policy for the exchange and return of merchandise and for adjustment for services rendered, and will give proper credit or refund for all such returns and will issue credit vouchers therefor. Members will deliver one copy of the credit voucher to the Card holder and will forward one copy of the credit voucher to Service Corporation together with payment to the order of Service Corporation of the net amount received by member for the sales draft to which the credit voucher relates. All credit vouchers will be forwarded by United States mail on or before the third banking business day after they are issued.

6. Member will forward all sales drafts for acceptance through regular banking channels and in deposit envelopes and with other forms provided by the Service Corporation. Member will deposit separately all sales drafts relating to Card holders whose account numbers are prefixed with the number 4418. All sales drafts will be deposited pursuant to instructions from Service Corporation.

7. Service Corporation will provide Member with an appropriate number of sales draft imprinters, which will remain the exclusive property of Service Corporation. Member shall

return such imprinters in good condition to Service Corporation upon termination of this Agreement. Member will pay an annual Service and Maintenance Fee as established from time to time by Service Corporation.

8. Service Corporation represents that First National Bank of Omaha has agreed to accept Card sales drafts presented to it through regular banking channels at such discount as is agreed upon between Member and Service Corporation from time to time. Each sales draft shall be placed in regular banking channels by Member on or before the third banking business day following the date of issuance. All such sales drafts will be endorsed by Member prior to placing them in regular banking channels, any holder of any of such drafts is authorized to place member's endorsement thereon. Member shall and hereby does waive notice of default or nonpayment, protest or notice of protest, demand for payment and any other demands or notices in connection with this agreement or any Sales Draft and Member consents to extensions of time granted, or compromise made, with any Card holder liable on any sales draft without affecting Member's liability thereon or under this agreement. In the event that First National Bank of Omaha fails to accept any such draft when tendered to it in compliance with this agreement, Service Corporation agrees, upon delivery thereof to it to pay the net amount thereof to Member.

9. Member agrees to pay to Service Corporation the net amount of any sales draft where: (1) merchandise is returned, whether or not a credit voucher is delivered to Service Corporation; (2) any sales transaction exceeds the dollar limitation of the Card and which has not otherwise been specifically authorized by Bank; (3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority;

(4) the sales draft is illegible; (5) the Card holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft accepted by such a holder or authorized user; (6) the sales draft was drawn by, or depository credit given to, member in circumstances constituting a breach of any term, condition, representation, warranty, or duty of Member hereunder; or (7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

10. First National Bank of Omaha shall have the sole right to receive payments on sales drafts accepted by it. Member agrees not to sue or to make any collections thereon, except as may be specifically authorized by First National Bank of Omaha. In the event of such authorization, Member agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

11. This Agreement shall become effective on the date indicated and shall remain in full force and effect until terminated by written notice. Either party may terminate this Agreement upon such written notice at any time. All obligations of Member incurred or existing under this Agreement as of the date of termination shall survive such termination. This Agreement shall be binding upon the parties hereto, their successors or assigns.

**MEMBER** .....  
 Address .....  
 By .....  
 Accepted: .....  
 By .....  
**FIRST OF OMAHA SERVICE CORPORATION**  
 Date .....



## EXHIBIT C

This agreement made and entered into between First National Bank of Omaha, hereinafter called "Bank" and First of Omaha Service Corporation, hereinafter called Service Corporation,

WHEREAS Bank has been licensed by BankAmerica Service Corporation to use the servicemarks, "BankAmericard" and the "Blue, White and Gold Bands," certain written materials and technical information hereinafter collectively called "BankAmericard Plan" and to offer BankAmericard Services, and

WHEREAS Bank desires to actively promote and expand the BankAmericard Plan in various states, including Nebraska, Iowa and South Dakota, and

WHEREAS Service Corporation has been organized by Bank for the purpose of promoting and expanding said plan, and Bank has, sponsored Service Corporation for a license to be granted by BankAmericard Service Corporation to use said service marks and BankAmericard Plan, which license shall be upon such terms and conditions as may be set forth therein, and

WHEREAS this agreement shall be of no force or effect until said license is granted and accepted;

NOW THEREFORE it is mutually covenanted and agreed between the parties hereto:

1. Service Corporation will actively solicit Merchant Members for the BankAmericard Plan in the States of Nebraska, Iowa, and South Dakota. Such Merchant Members will be enrolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. Such Merchant Members will be

selected in accordance with quality standards to be established from time to time by Bank.

2. In performing its obligations hereunder Service Corporation will cooperate with and seek the assistance of other banks and will actively solicit such other banks to enter in agency bank agreement with it upon the terms and conditions set forth in the agency bank agreement attached hereto as Exhibit B.

3. Service Corporation will at all times maintain an adequate supply of BankAmericard forms and supplies and will furnish such materials, forms, supplies and equipment to Merchant Members and agent banks as required.

4. Service Corporation will assist Merchant Members and agent banks in their BankAmericard Plan operations.

5. Service Corporation will actively solicit and obtain applications for BankAmericard and will forward such applications to Bank for its approval. Upon approval of such applications by Bank at Omaha, Nebraska, Bank will issue BankAmericards and deliver them to Service Corporation at Omaha, Nebraska. Service Corporation shall promptly deliver such cards to the persons named thereon.

6. Bank will accept, at Omaha, Nebraska, through regular banking channels, all valid, properly executed sales drafts and cash advance drafts resulting from the use of any valid, unexpired, properly tendered credit card bearing either of said service marks which was issued by any licensee of BankAmerica Service Corporation or by Bank America National Trust and Savings Association presented to it by Merchant Members and agent banks enrolled by Service Corporation as herein provided for and upon the terms and conditions set forth in Exhibits A and B.

7. As compensation hereunder Bank will pay to Service Corporation \$1,000.00 per month.

8. Service Corporation shall collect and retain all Merchant Members enrollment fees.

9. Bank will keep accurate books and records concerning all transactions originating with Merchant Members and Agent Banks enrolled by Service Corporation and will, upon request of Service Corporation, furnish such information as Service Corporation shall reasonably require.

10. Bank will, at Service Corporation's request, transfer to Service Corporation any BankAmericard sales draft which originated with a Merchant Member or Agent Bank enrolled by Service Corporation. The consideration for such transfer shall be the amount Bank paid for the draft by Bank.

11. Service Corporation will, at Bank's request, acquire:

a. Any BankAmericard Sales draft which has not been paid by the cardholder and which originated with a Merchant Member enrolled by Service Corporation and concerning which

- (1) merchandise has been returned whether or not a credit voucher has been delivered to Service Corporation, or
- (2) any sales transaction exceeds the dollar limitation and which has not otherwise been specifically authorized by Bank, or
- (3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority, or
- (4) the sales draft is illegible, or
- (5) the BankAmericard holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the

sales draft accepted by such holder or authorized user, or

- (6) the sales draft was drawn by, or depository credit given to a Merchant Member in circumstances constituting a breach of any term, condition, representation, warranty, or duty of the Merchant Member under Exhibit A, or
- (7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

b. Any instant cash voucher which originated with an Agent Bank concerning which

- i. the draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or
- ii. the draft is illegible, or
- iii. the draft is alleged to have been drawn improperly or without authority, or
- iv. the BankAmericard was invalid at the time the draft was drawn as determined by the card's format and current void lists provided by Service Corporation.

c. Any such sales draft or drafts totaling not more than \$\_\_\_\_\_ in the aggregate.

The transfer price shall be those amounts paid by Bank for such draft or drafts.

12. Except in the case of sales drafts acquired by Service Corporation in accordance with paragraphs 10 and 11 of this agreement, Bank shall have the sole right to receive payment on sales drafts accepted by it. Service Corporation agrees not

to sue or make any collections thereon except as specifically authorized or requested by Bank. In the event of such authorization or request, Service Corporation agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

13. For purposes of this agreement, Merchant Members enrolled by Agent Banks shall be deemed to have been enrolled by Service Corporation if Service Corporation enrolled the Agent Bank.

14. This agreement shall become effective upon execution and shall continue until terminated;

- a. By 60 days written notice from either party which may be given at any time, or
- b. The expiration or termination of the agreement between Bank and BankAmerica Service Corporation, or
- c. The expiration or termination of the license granted by BankAmerica Service Corporation to Service Corporation.

termination shall continue until they are completely fulfilled or performed.

15. This agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

16. The only parties to this agreement are Bank and Service Corporation. BankAmerica Service Corporation, Agent Banks and Merchant Members are not parties hereto and shall have no rights hereunder. Each party to this agreement acts as a principal and not as an agent for any other person, firm or corporation. Neither party hereto is an agent for the other and nothing in this agreement shall be construed as creating an agent-principal relation between them.

17. All of Bank's duties and obligations under this agreement are to be performed at Omaha, Nebraska.

??????

First of Omaha Service Corp.

??????

First National Bank of Omaha

Dated: -??-68

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Civil No. 4-76-251

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

AFFIDAVIT OF DALE HARRIS  
STATE OF MINNESOTA  
COUNTY OF HENNEPIN—ss.

DALE HARRIS, being duly sworn, deposes and says that:

1. He is Vice President and Manager of the BankAmericard Department of the plaintiff, The Marquette National Bank of Minneapolis (hereinafter referred to as "Marquette").
2. Marquette is a national banking association with its principal offices, including its BankAmericard Department offices, located in the County of Hennepin, State of Minnesota.



3. Marquette is licensed by National BankAmericard, Incorporated (a California-based corporation) to issue BankAmericard credit cards, and Marquette has operated a BankAmericard program throughout the State of Minnesota since 1968. As shown by the application attached to the Complaint as Exhibit 1, Marquette's BankAmericard program provides for an interest rate of 1 percent per month (12 percent per year) computed on the average daily balance of the monthly account of any customer wishing to defer payment of charges to his account. In addition, Marquette charges an annual membership fee of \$10 to its cardholders.

4. The First National Bank of Omaha (hereinafter referred to as the "Omaha Bank") is also a licensee of National BankAmericard, Incorporated and has issued BankAmericard credit cards in several states. Since approximately November, 1975, a continuous and systematic solicitation campaign has been conducted in the State of Minnesota urging Minnesota residents and customers of Marquette's BankAmericard program to contract with the Omaha Bank's BankAmericard program. This solicitation campaign has been conducted by various means including, without limitation, mass mailings of brochures and applications of the type attached to the Complaint as Exhibit 2, as well as telephonic solicitation. The Omaha Bank's BankAmericard program so advertised in this solicitation provides for a rate of interest of 1 1/2 percent per month (18 percent per year) computed on the previous month's unpaid balance of the monthly account of any customer deferring payment on his account. Affiant believes that no membership fee is being charged at this time to cardholders in the Omaha Bank's BankAmericard program.

5. Since November, 1975, Marquette has received, on a continuing basis, hundreds of telephone and letter inquiries

and complaints from its BankAmericard customers confused and misled by the solicitations for the Omaha Bank's BankAmericard program. A few examples of the type of communications received by Marquette in recent months are attached hereto and made a part hereof as Exhibits A through N. They are typical of the type of confusion resulting from said solicitation including, consumers believing Marquette is the source of the solicitation; that Marquette actually operates the BankAmericard program so advertised; that Marquette sponsors the Omaha Bank's BankAmericard program; and that Marquette charges its \$10 membership fee on an indiscriminate basis. Customers of Marquette have threatened to terminate their business relationship with Marquette because of this confusion. Marquette has also incurred and continues to incur substantial expenses in receiving and answering the hundreds of inquiries which it has received from persons confused by the aforesaid solicitation campaign.

6. Because of the high costs involved in operating a bank credit card program, Marquette has found such a program can be maintained at a profit under the Minnesota statutory limitation on finance charges of 1 percent per month only if the program carries with it an annual membership fee permitted by Minnesota law of \$10. Affiant believes the Omaha Bank's BankAmericard program is able to operate in Minnesota without a membership fee to cardholders only because it imposes finance charges of 1 1/2 percent per month in violation of Minnesota law. This has resulted in the Omaha Bank's BankAmericard program operating in Minnesota at a great competitive advantage over Marquette and over other bank credit card programs in the State, which are forced to charge a membership fee.

7. A large number of Marquette's customers are known to have already switched from Marquette's BankAmericard program to the Omaha Bank's BankAmericard program as a result of the above-mentioned solicitation campaign, and many other customers of Marquette have threatened to terminate their business relationship as a result of the solicitation and operation of the Omaha Bank's BankAmericard program as it now exists in Minnesota. Due to the fact, however, that an account does not have to advise Marquette when it terminates as a cardholder under Marquette's program in favor of the Omaha Bank's program, only a very small percentage of the total number of accounts lost by Marquette is ascertainable without discovery from defendants. Marquette faces the threat of further substantial injury by reason of loss of present customers and loss of potential customers, as long as the Omaha Bank's BankAmericard program is permitted to solicit and operate with finance charges of 1 1/2 percent per month; and, as long as the manner of solicitation continues to be misleading and confusing to customers of Marquette and to other Minnesota consumers.

DALE HARRIS

Subscribed and sworn to before me this 22nd day of July, 1976.

—J. Patrick McDavitt, Notary Public, Hennepin County, Minn.

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

4-76 Civ.251

MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST  
OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

MEMORANDUM ORDER

JOHN TROYER, Esq. and J. PATRICK McDAVITT, Esq.,  
Levitt, Palmer, Bowen, Bearmon & Rotman, Minneapolis,  
Minnesota, appeared for plaintiff.

CLAY R. MOORE, Esq., and FRANK A. DVORAK, Esq.,  
Mackall, Crounse & Moore, Minneapolis, Minnesota, together  
with DONALD J. BURESH, Esq., Swarr, May, Smith &  
Andersen, Omaha, Nebraska, appeared for defendants First  
National Bank of Omaha and First of Omaha Service Cor-  
poration.

JAMES W. BREHL, Esq., Maun, Hazel, Green, Hayes, Simon  
and Aretz, St. Paul, Minnesota, appeared for defendant  
Credit Bureau of St. Paul, Inc.

The plaintiff, Marquette National Bank of Minneapolis  
(Marquette Bank), is a national banking association located  
and having its principal place of business in Minneapolis, Min-  
nesota. The defendant First National Bank of Omaha (Omaha  
Bank) is a national banking association located and having its

principal place of business in Omaha, Nebraska. The defendant First of Omaha Service Corporation (Omaha Service Corporation) is a Nebraska corporation qualified to do business in Minnesota. The defendant Credit Bureau of St. Paul, Inc., (Credit Bureau) is a Minnesota corporation.

The case was commenced in the District Court of Hennepin County, Minnesota, by service of a summons and complaint on the Omaha Bank, the Omaha Service Corporation and the Credit Bureau. The Credit Bureau filed an answer. Pursuant to 28 U.S.C. § 1441 *et seq.*, the defendants then joined to remove the case to this court. Subsequent to the filing of the removal petition, the plaintiff voluntarily dismissed as to the Omaha Bank. The plaintiff moves to remand.

The complaint sets forth the plaintiff's causes of action in five counts. Count I substantially alleges that through acts of the Omaha Service Corporation and the Credit Bureau the Omaha Bank has induced Minnesota residents to contract with the Omaha Bank's BankAmericard program and that the Omaha Bank's BankAmericard program assesses finance charges at rates in excess of those allowed by the Minnesota Bank Credit Card Act, Minn. Stat. Ann. § 48.185.<sup>1</sup>

<sup>1</sup> Minn. Stat. Ann. § 48.185 provides in pertinent part:

(1) Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to Minnesota Statutes, Chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card or overdraft checking plan.

\* \* \*

(3) A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle.

\* \* \*

(6) This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an

Count II, after repeating the allegations of Count I, alleges in effect that the defendants Omaha Service Corporation and the Credit Bureau have themselves violated and have conspired with the Omaha Bank to violate the Minnesota Bank Credit Card Act.

Count III, repeating all previous allegations, substantially alleges that the solicitation campaign conducted by the defendants on behalf of the Omaha Bank's BankAmericard program is carried on in violation of the Minnesota Deceptive Trade Practices Act, Minn. Stat. Ann. § 325.772. Specific deceptive trade practices are then alleged.

Count IV, repeating all previous allegations, alleges in effect that the defendants have violated and have conspired to violate both the Bank Credit Card Act and the Deceptive Trade Practices Act.

Count V, repeating all previous allegations, alleges that the defendants engaged in unfair competition and tortiously in-

open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state.

\* \* \*

(7) Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section.

\* \* \*

The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

\* \* \*



terfered with the plaintiff's contractual relationships with its own BankAmericard customers.

The plaintiff seeks a permanent injunction, compensatory damages, and punitive damages.

Preliminarily, it should be noted that, in general, removability of an action under 28 U.S.C. § 1446 is to be determined as of the time the removal petition is filed. Therefore, the proceedings in a case subsequent to removal will not defeat federal jurisdiction. 1A J. Moore, *Federal Practice* ¶ 0.517 [12], at 155 (2d ed. 1974).

The determination of whether a case commenced in a state court may be removed to federal court is governed by the provisions of 28 U.S.C. § 1441:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be re-

moved and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

The first issue presented to the court is whether this court has removal jurisdiction based upon diversity of citizenship. Removal jurisdiction is keyed to original federal jurisdiction. Original jurisdiction in diversity cases in which the amount in controversy exceeds \$10,000 requires that there be complete diversity. 28 U.S.C. § 1332. Removal jurisdiction requires both that there be complete diversity and that no defendant be a citizen of the forum state. 28 U.S.C. § 1441; 1A J. Moore, *Federal Practice* ¶ 0.161 [1], at 197, 205 (2d ed. 1974).

If the court were to accept the characterizations of the parties as plaintiff and defendant as contained in the complaint, it is clear that there would be neither original nor removal jurisdiction based on diversity of citizenship. There would be no original jurisdiction because both the plaintiff and the defendant Credit Bureau are citizens of Minnesota. There would be no removal jurisdiction because the defendant Credit Bureau is a citizen of Minnesota, and Minnesota is the state in which the action is brought.

It is also clear, however, that the characterizations of the complaint are not controlling if there has been fraudulent joinder. 1A J. Moore, *Federal Practice* ¶ 0.161 [1], at 199 (2d ed. 1974). Under such circumstances parties must be aligned according to their real interests. *Boatmen's Bank v. Fritzlen*, 135 F. 650 (8th Cir.), *cert. denied*, 198 U.S. 586 (1905). Therefore, a defendant who is fraudulently joined is to be disregarded in determining the existence of diversity jurisdiction. 1A J. Moore, *Federal Practice* ¶ 0.161 [2], at 210 (2d ed. 1974). Whether the joinder is fraudulent or not depends on whether the plaintiff really intended to obtain a judgment

against the defendant whose joinder is alleged to be fraudulent, *Bolstad v. Central Surety & Ins. Corp.*, 168 F.2d 927 (8th Cir. 1948); *Harrelson v. Missouri Pac. Transp. Co.*, 87 F.2d 176 (8th Cir. 1936); *Huffman v. Baldwin*, 82 F.2d 5 (8th Cir.), cert. denied, 299 U.S. 550 (1936); *Leonard v. St. Joseph Lead Co.*, 75 F.2d 390 (8th Cir. 1935).

The plaintiff's complaint states causes of action based on conspiracy, deceptive trade practices and tortious interference with contractual relations against the Credit Bureau. Although it denies liability, the Credit Bureau admits certain of the acts complained of. It, therefore, seems that the plaintiff really intends to obtain a judgment against the Credit Bureau. Thus, the plaintiff's joinder of the Credit Bureau is not fraudulent, and removal on the basis of diversity of citizenship would be improper.

The second issue presented to the court is whether this court has removal jurisdiction based on a claim which, in fact, arises under the Constitution or laws of the United States. It is clear that the causes of action relating to conspiracy,<sup>2</sup> deceptive trade practices, unfair competition and tortious interference with contractual relations do not state claims arising under federal law. The dispute concerning original jurisdiction based upon a federal question derives from the cause of action alleging that the interest rates charged by the Omaha Bank's BankAmericard program violate Minnesota law. The plaintiff

<sup>2</sup> The defendants argue that allegations of a conspiracy in which a national banking association is claimed to have conspired with others to charge excessive interest rates necessarily present a federal question because interest rates charged by national banking associations are governed by federal statute and any conspiracy to violate a federal statute would present a federal question. The court does not agree. A cause of action alleging a civil conspiracy is a state law claim whether the statute to be violated is state or federal. See *Iowa ex rel. Turner v. First of Omaha Sav. Corp.*, 401 F. Supp. 439 (S.D. Iowa 1975).

argues that the complaint as filed in state court neither raises nor asserts any federal right or question, but that to the contrary it is one based solely on rights created by the Minnesota Bank Credit Card Act. The defendants, on the other hand, contend that the cause of action alleging an illegal interest rate, notwithstanding the plaintiff's characterization thereof as a violation of Minnesota law, must be construed as a claim that 12 U.S.C. § 85<sup>3</sup> has been violated. The defendants urge that because 12 U.S.C. § 85 preempts state regulation of interest rates charged by national banking associations, any claim that interest rates are excessive can only be litigated as a claim arising under that statute. If the plaintiff's claim does raise a federal question based solely upon 12 U.S.C. § 85, it is undisputed that original federal jurisdiction is invoked pursuant

<sup>3</sup> 12 U.S.C. § 85 (1976) provides in pertinent part:

Any [national banking] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the law of the State Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal reserve district where the bank is located, whichever may be the greater and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge at a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater. . . .



to 28 U.S.C. § 1337. *Burns v. American Nat'l Bank & Trust Co.*, 479 F.2d 26 (8th Cir. 1973).

If the cause of action alleging the charging of excessive interest rates actually set forth claims which arise only under 12 U.S.C. § 85, removal was clearly in order; if it does not, remand is required. The court concludes that the plaintiff's claim based on the allegation that the Omaha Bank charges excess rates of interest does not arise under 12 U.S.C. § 85, and, therefore, remand is required.

The traditional rule in removal proceedings prohibits the court from looking outside the plaintiff's own complaint to determine whether or not a suit arises under federal law. The Supreme Court has stated the applicable tests in *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936):

[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. [citations omitted]

It is undisputed that where the plaintiff's claim involves both a federal ground and a state ground, the plaintiff is normally free to ignore the federal question and assert only the state ground as a basis for his claim. 1A J. Moore, *Federal*

*Practice* ¶ 0.160, at 185 (2d ed. 1974). As the Supreme Court noted in *Great Northern Ry. v. Alexander*, 246 U.S. 276, 282 (1918):

[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . when it is commenced, and . . . this power to determine removability . . . continues with the plaintiff throughout the litigation, so that whether such a case . . . shall afterwards become removable depends . . . solely upon the form which the plaintiff by his voluntary action shall give to the pleadings . . . .

It is clear that the plaintiff intends to base its claims regarding the Omaha Bank's interest rates on state grounds. The plaintiff initially brought the case in state court. At no point in its complaint did the plaintiff so much as allude to 12 U.S.C. § 85, nor has it ever indicated any desire to rely on such a law. Indeed, the plaintiff has vociferously disclaimed any desire or intention to recover on anything other than a state law cause of action.

However, it is also clear that 12 U.S.C. § 85 governs the interest rates chargeable by national banks. It is equally clear that § 85 allows national banks to select an interest rate established by state law for state banks.<sup>4</sup> Thus, although a state by its regulation of interest rates chargeable by state banks may control the rate of interest which some national banks have selected, the state may not prohibit a national bank from selecting another rate of interest which might permit the bank

<sup>4</sup> The court expresses no opinion as to whether the Omaha Bank is limited to selecting a rate of interest chargeable by state banks in Minnesota when the Omaha Bank extends credit through its BankAmericard program to residents of Minnesota. Compare *Meadow Brook Nat'l Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969), with *Fisher v. First Nat'l Bank*, 538 F.2d 1284 (7th Cir. 1976).



to charge interest rates in excess of that allowed to state banks. Such is the case because federal law preempts state law in the area of regulation of interest rates chargeable by national banks. *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901); *Farmers' & Mechanics' Nat'l Bank v. Dear- ing*, 91 U.S. 29 (1875); *American Timber & Trading Co. v. First Nat'l Bank*, 511 F.2d 980 (9th Cir. 1973), cert. denied, 421 U.S. 921 (1975); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684 (E.D. Pa. 1973).

The defendants contend that the plaintiff's claim that the Omaha Bank assesses finance charges which are excessive is a claim arising under the laws of the United States. This contention is based upon an assumption that because federal law has preempted state law in the area and therefore governs the ultimate determination of the claim, the plaintiff has no state law claim based on excessive interest rates and states a federal claim whether he wishes to do so or not. See *Aveo Corp. v. Aero Lodge 735, IAM*, 390 U.S. 557 (1968); *Hearst Corp. v. Shopping Center Network, Inc.*, 307 F. Supp. 551 (S.D.N.Y. 1969); *Sylgab Steel & Wire Corp. v. Strickland Transp. Co.*, 270 F. Supp. 264 (E.D.N.Y. 1967); *Fay v. American Cysto- scope Makers, Inc.*, 98 F. Supp. 278 (S.D.N.Y. 1951).

The defendants contend that the issue of the existence of a federal question is controlled by the rule laid down in *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820 (10th Cir. 1972). The plaintiff in *North Davis Bank* argued that removal was improper because the complaint which it had filed in state court neither raised nor asserted any federal right or question but that the complaint was one based solely on a violation of state law. The defendant maintained, and the court agreed, that even though federal law allowed national banks to establish and operate branch banks only if the host state permitted state

banks to do so, the case was one having its source in and arising under federal law and that the case was properly removed as one arising under federal law. Likewise, the defendants here assert that, although the plaintiff states its claim solely in terms of a violation of Minn. Stat. Ann. §48.185, the plaintiff's claim that the Omaha Bank's BankAmericard program assesses finance charges in excess of those allowed by law is to be justiciable only under 12 U.S.C. § 85. The defendants further assert that, therefore, the real nature of the claim is federal, irrespective of the plaintiff's characterization of its claim as a state law claim.

The court realizes that there is substantial support for the defendants' argument that federal question jurisdiction is present in cases in which federal law preempts the state law under which the cause of action arises. See, e.g., *Aveo Corp. v. Aero Lodge 735, IAM*, 390 U.S. 557 (1968); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820 (10th Cir. 1972); *Ulchny v. General Elec. Co.*, 309 F. Supp. 437 (N.D.N.Y. 1970); *Suburban Trust Co. v. National Bank of Westfield*, 211 F. Supp. 694 (D.N.J. 1962); 1A J. Moore, *Federal Practice* ¶ 0.160, at 186 (2d ed. 1974). The court, however, does not think that the defendants' argument correctly states the law. 13 Wright & Miller, *Federal Practice & Procedure* § 3562 and § 3571, at 478 (1975). Federal preemption may offer a valid defense to a state law claim, but preemption does not convert a state law claim to which preemption is a defense into a claim arising under federal law. E.g., *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961); *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916);

*Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *La Chemise Lacoate v. Alligator Co.*, 506 F.2d 339 (3d Cir. 1974), cert. denied, 421 U.S. 987 (1975); *Washington v. American League*, 460 F.2d 654 (9th Cir. 1972); *Bastrop Loan Co. v. Burley*, 392 F. Supp. 970 (W.D. La. 1975); *City of New Orleans v. United Gas Pipe Line Co.*, 390 F. Supp. 861 (E.D. La. 1974); *New York ex rel. Lefkowitz v. Transcience Corp.*, 362 F. Supp. 922 (S.D.N.Y. 1973); 13 Wright & Miller, *Federal Practice & Procedure* § 3562 and § 3571 (1975).

The court thinks that the law is well-stated in *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). In *Gully*, the Supreme Court stated:

By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Id.* at 116.

Thus, although federal law may well be determinative in a case in which a federal statute is raised as a defense to a state law claim, the case is not transformed automatically into one arising under federal law because of a preemption defense. In the present case, 12 U.S.C. § 85 comes into the case only by way of defense to a state-created claim. 13 Wright & Miller, *Federal Practice & Procedure* § 3571, at 478 (1975).

The court concludes that removal was not proper because the claim that the Omaha Bank charges unlawful rates of interest is not one which arises under the laws of the United States. Therefore, remand is in order.

Even if the claim that the Omaha Bank charges unlawful rates of interest were to be considered as arising under federal law, this court would nevertheless be inclined to order remand.

If the claim that the Omaha Bank charges unlawful rates of interest had been one which allowed removal, the entire case could have been removed pursuant to 28 U.S.C. § 1441. The claim that the Omaha Bank, the Omaha Service Corporation and the Credit Bureau conspired to charge rates of interest in excess of those allowed by law would be removable as a claim pendent to the one arising under federal law. The claims of deceptive trade practices, conspiracy to engage in deceptive trade practices, unfair competition and tortious interference with contract would be removable as separate and independent claims which had been joined with an otherwise removable claim.

It has long been recognized that federal courts have jurisdiction of a state law claim which is so closely related to a federal question as to be within the ancillary, or pendent, jurisdiction of the federal court. See *Hurn v. Oursler*, 289 U.S. 238 (1933). A state law claim is pendent if the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The claims that the Omaha Bank is charging unlawful rates of interest and that the Omaha Service Corporation and the Credit Bureau conspired with the Omaha Bank to allow the Omaha Bank to do so derive from a common nucleus of operative fact. Therefore, the conspiracy claim would have been removable if the Marquette Bank's claim that the Omaha Bank charges an unlawful rate of interest had arisen under federal law.

Pursuant to 28 U.S.C. § 1441 (c), a federal court may exercise jurisdiction over the entire case whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more

otherwise non-removable claims or causes of action. Claims are separate and independent if the rights which the plaintiff seeks to enforce are distinct. 1A J. Moore, *Federal Practice* ¶ 0.163 [4.5], at 708 (2d ed. 1974). The right of a competitor to be free of deceptive trade practices and unfair competition and the right of a party to a contract to be free of an outsider's interference with the contract are rights which are clearly distinct from the right to expect that a bank will charge rates of interest within the limits established by law. Therefore, the entire case would have been removable if the Marquette Bank's claim that the Omaha Bank charges an unlawful rate of interest had arisen under federal law.

However, even if the entire case had been properly removed, the court would remand the non-federal claims to the District Court of Hennepin County, Minnesota. Although 12 U.S.C. § 1441 (c) provides that the federal court may determine all the issues in a case in which a removable claim is joined with one or more separate and independent non-removable claims, the court is not required to do so. Pursuant to another provision of § 1441(c), the court may remand all matters not otherwise within its original jurisdiction.

The claims against the Omaha Service Corporation and the Credit Bureau are state law claims over which the court would have no original jurisdiction. Therefore, the court is not required to retain jurisdiction over the claims against the Omaha Service Corporation and the Credit Bureau.

Subsequent to the defendants' filing of the removal petition and prior to the Omaha Bank's serving of an answer, the plaintiff entered a voluntary dismissal as to the Omaha Bank pursuant to Rule 41 (a) (1) (i), Fed.R.Civ.P. Because the claim against the Omaha Bank is the only one which arguably arises under the laws of the United States, there is no longer

any claim arising under federal law before the court. Because no claim arising under federal law is still before the court, the court is persuaded that the remaining claims should be remanded. It appears to this court inappropriate to retain jurisdiction "where the federal head of jurisdiction has vanished from the case, and there has been no substantial commitment of judicial resources to the nonfederal claims." See *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965); *Rotermund v. United States Steel Corp.*, 346 F. Supp. 69 (E.D. Mo. 1972), *aff'd*, 474 F.2d 1139 (8th Cir. 1973). In this instance, it would make little sense to retain jurisdiction and to determine the non-federal claims even though the claim which served as a basis for federal jurisdiction is no longer at issue in the case and the defendant against whom that claim was asserted is no longer before the court.

Upon the foregoing,

IT IS ORDERED That the claims against the Omaha Service Corporation and the Credit Bureau be and the same hereby are remanded to the District Court of Hennepin County, Minnesota.

Dated: November 18, 1976.

DONALD D. ALSOP

United States District Judge



STATE OF MINNESOTA                      DISTRICT COURT  
County of Hennepin                      Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,  
Defendants.

APPLICATION FOR TEMPORARY  
RESTRAINING ORDER

Plaintiff, The Marquette National Bank of Minneapolis, applies to the Court for a temporary restraining order pursuant to Rule 65.01 of the Minnesota Rules of Civil Procedure, enjoining defendant First of Omaha Service Corporation from all activities in connection with the solicitation and operation of the BankAmericard credit card program of the First National Bank of Omaha in the State of Minnesota, until further order of the Court.

The grounds for this application are set forth in the plaintiff's Verified Complaint herein and the Affidavit of John Troyer attached hereto and made a part hereof. Immediate and irreparable injury, loss and damage will result to plaintiff if the First of Omaha Service Corporation is not restrained from soliciting and operating the aforesaid BankAmericard program in violation of Minnesota's bank credit card statute (Minnesota Statutes, §48.185) and deceptive trade practices

law (Minnesota Statutes, §325.772) as more fully described in the Verified Complaint.

Dated: December 14, 1976.

Respectfully submitted,  
LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

John Troyer

J. Patrick McDavitt

Attorneys for Plaintiff

The Marquette National

Bank of Minneapolis

500 Roanoke Building

Minneapolis, Minnesota 55402

Telephone: 339-0661

STATE OF MINNESOTA                      DISTRICT COURT  
County of Hennepin                      Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,  
Defendants.

TEMPORARY RESTRAINING ORDER

Upon the Application for Temporary Restraining Order and the verified Complaint of plaintiff, The Marquette National Bank of Minneapolis, the Affidavit of John Troyer, and all the files and proceedings herein,

IT IS HEREBY ORDERED that upon the filing of a Bond by the plaintiff, in the amount of \$10,000.00 approved by this Court, defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, shall refrain from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185 until the further order of this Court.

Let this Order be served upon the said defendant, First of Omaha Service Corporation, by serving a copy of same upon Clay R. Moore, attorney for defendant First of Omaha Service Corporation, 1000 First National Bank Building, Minneapolis, Minnesota 55402.

Dated: December 22, 1976.

By the Court  
 RICHARD J. KANTOROWICZ  
 Judge of District Court

#### MEMORANDUM

Plaintiff, a bank chartered under the National Banking Act in the State of Minnesota, brings this motion for a temporary restraining order forbidding defendants from soliciting BankAmericard customers and charging an interest rate greater than allowed by Minnesota Statute 48.185. Defendants are soliciting on behalf of the First National Bank of Omaha, Nebraska.

It appears that under Minnesota Law 48.185, Minnesota banks may extend loans to credit card customers at a rate not to exceed 12% (1% per month) per annum; but allows a \$15.00 per year service charge to be assessed for each cardholder. Plaintiff charges only a \$10.00 fee.

Defendants contend that they enjoy the privilege of a National Bank and that 12 U.S.C. §85 allows them to charge the interest rate of the state where they are located; that being 18% per annum, the rate allowed under Nebraska law.

This court finds no case cited by defendant which allows a national bank to charge an interest rate greater than the highest legal interest rate charged in the state where it operates. Defendants claim that the case of *Fisher v. First National Bank*, 538 F.2d 1284 (1976), supports their position. The decision there, in effect, follows the previous law which is to apply the most favored lending rate to national banks doing business in the state.

Although the parties argue pre-emption, none of the cases deal with this problem as a pre-emption problem. In fact, most of the cases talk in terms of most favored lending rate. Most favored lending rate is the rate given to any lender in the state, even though the maximum rate allowed a state bank is lower. In some limited cases, the national bank is able to charge a higher interest rate than a state bank.

No court has allowed a state with a high interest rate to export that high rate to another state. Such a result would be unconscionable. For a hundred years Congress has allowed states to set their own interest rates. The only prohibition has been that states could not discriminate against national banks, by limiting them to the interest charges of a state bank, if that state bank interest is less than individuals or other associations are allowed to charge. This is the so-called, most favored lender theory.

"The question whether there has been a pre-emption in a given field is always one of legislative intent." *State v. Barberian*, Rhode Island, (1965) 214 A.2d 465.

To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.

Because this matter comes on as a motion for a Temporary Restraining Order, there may be further facts that may affect the court's decision. It is therefore necessary to take testimony. In view of the fact defendants are claiming a Minnesota law is unconstitutional as to them, the Attorney General should be notified and be given leave to intervene.

Upon Plaintiff's filing a bond of \$10,000, the Temporary Restraining Order is granted.

R.J.K.

State of Minnesota,  
County of Hennepin—ss.

M. L. Levitt, being duly sworn, on oath says; that on the 22nd day of December, 1976, he served the attached Temporary Restraining Order upon First of Omaha Service Corporation therein named, personally, at the offices of said defendant's attorney, Clay R. Moore, 1000 First National Bank Building in the County of Hennepin, State of Minnesota, by handing to and leaving with Clay R. Moore, true and correct copy thereof.

M. L. LEVITT

Subscribed and sworn to before me this 22nd day of December, 1976. —Carole L. Nelson, Notary Public, Hennepin County, Minnesota. My commission expires Dec. 19, 1981.

EXHIBIT B

STATE OF MINNESOTA

DISTRICT COURT

County of Hennepin

Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

TEMPORARY RESTRAINING ORDER

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IT IS HEREBY ORDERED that upon the filing of a Bond by the plaintiff, in the amount of \$10,000.00 approved by this Court, defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, shall refrain from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185 until the further order of this Court.

Let this Order be served upon the said defendant, First of Omaha Service Corporation, by serving a copy of same upon Clay R. Moore, attorney for defendant First of Omaha Service



Corporation, 1000 First National Bank Building, Minneapolis, Minnesota 55402.

Dated: December 22, 1976.

By the Court

RICHARD J. KANTOROWICZ

Judge of District Court

# MEMORANDUM

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It appears that under Minnesota Law 48.185, Minnesota banks may extend loans to credit card customers at a rate not to exceed 12% (1% per month) per annum; but allows a \$15.00 per year service charge to be assessed for each cardholder. Plaintiff charges only a \$10.00 fee.

Defendants contend that they enjoy the privilege of a National Bank and that 12 U.S.C. §85 allows them to charge the interest rate of the state where they are located; that being 18% per annum, the rate allowed under Nebraska law.

This court finds no case cited by defendant which allows a national bank to charge an interest rate greater than the highest legal interest rate charged in the state where it operates. Defendants claim that the case of *Fisher v. First National Bank*, 538 F.2d 1284 (1976), supports their position. The decision there, in effect, follows the previous law which is to apply the most favored lending rate to national banks doing business in the state.

Although the parties argue pre-emption, none of the cases deal with this problem as a pre-emption problem. In fact, most of the cases talk in terms of most favored lending rate. Most favored lending rate is the rate given to any lender in the state, even though the maximum rate allowed a state bank is lower. In some limited cases, the national bank is able to charge a higher interest rate than a state bank.

No court has allowed a state with a high interest rate to export that high rate to another state. Such a result would be unconscionable. For a hundred years Congress has allowed states to set their own interest rates. The only prohibition has been that states could not discriminate against national banks, by limiting them to the interest charges of a state bank, if that state bank interest is less than individuals or other associations are allowed to charge. This is the so-called, most favored lender theory.

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To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.

Because this matter comes on as a motion for a Temporary Restraining Order, there may be further facts that may affect the court's decision. It is therefore necessary to take testimony. In view of the fact defendants are claiming a Minnesota law is unconstitutional as to them, the Attorney General should be notified and be given leave to intervene.

Upon Plaintiff's filing a bond of \$10,000, the Temporary Restraining Order is granted.

R.J.K.

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STATE OF MINNESOTA  
IN SUPREME COURT

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47409

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FIRST OF OMAHA SERVICE CORPORATION,  
Defendant-Petitioner,  
vs.  
MARQUETTE NATIONAL BANK,  
Plaintiff-Respondent.

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PETITION FOR  
WRIT OF PROHIBITION

To: The Supreme Court of the State of Minnesota

The Petitioner, defendant First of Omaha Service Corporation, requests a writ of prohibition on the following grounds:

- 1) This action was originally commenced in May, 1976 in the district court of Hennepin County, Fourth Judicial District under Civil File No. 726526.
- 2) On June 11, 1976, this action was removed to the United States District Court for the District of Minnesota, Fourth Division, and assigned to the Honorable Donald Alsop, U.S. District Judge.
- 3) On November 18, 1976, Judge Alsop issued his order remanding the case to the state court. (See Judge Alsop's order, Exhibit A.)

- 4) On December 15, 1976, plaintiff Marquette moved the state district court (Kantorowicz, J.) for a temporary restraining order prohibiting the defendant First of Omaha Service Corporation from "engaging in any solicitation or other activity" in connection with a bank credit card program "at interest rates in excess of that permitted under Minnesota Statutes §48.185".
- 5) On December 22, 1976, Judge Kantorowicz issued a temporary restraining order as requested with no time limit except "until further order of the Court" (See Exhibit B).
- 6) The Bankamericard Credit Card program, in which this defendant is involved, is a program directed and owned by the First National Bank of Omaha (the parent corporation of this defendant). The First National Bank of Omaha was originally joined as a defendant by plaintiff but, after removal to federal court (and prior to remand), was voluntarily dismissed as a defendant by the plaintiff by reason of federal venue restrictions as to suits against national banks (see 12 U.S.C. §94). The Bank Americard credit card involved, however, is issued only by the First National Bank of Omaha and all interest charges thereon are assessed by said bank and no other entity (see affidavit of James Doody, Exhibit C).
- 7) The rates of interest allowed to the First National Bank of Omaha are governed solely by federal law, to wit: 12 U.S.C. §85 which preempts the operation of any state law as to interest rates chargeable by national banks (see Judge Alsop's opinion, Exhibit A, page 7).
- 8) 12 U.S.C. §85 permits a national bank to charge the interest rates allowed by the state "where it is located";

a national bank which loans money or extends credit by use of a credit card or otherwise to a resident of another state may, if it chooses, charge those rates permitted by the laws of its home state. See *Fisher vs. First National Bank of Chicago*, (7 Cir. 1976) 538 F. 2d 1284, decided July 29, 1976, in which it was held that a national bank located in Illinois may, under 12 U.S.C. §85, charge interest rates provided in Illinois law under a credit card issued to an Iowa resident. The Court also held that the Illinois domiciled bank could, but was not required to, charge those rates allowed under Iowa law.

- 9) The First National Bank of Omaha charges 18% (on the first \$1000 due balance) for all credit extended by it through the use of its Bank Americard credit card; these charges are in accordance with the provisions of Nebraska law, i.e., Revised Nebraska Statutes §8-820 (Exhibit D).
- 10) As applied to the facts of this case, 12 U.S.C. §85 as interpreted in *Fisher vs. First National Bank of Chicago*, supra, among other cases, permits the First National Bank of Omaha to extend credit to Minnesota residents through its Bank Americard credit card and to charge Minnesota residents interest rates in accordance with Nebraska law; it is not required to conform to Minnesota Statutes §48.185.
- 11) The exclusive remedy against a national bank for allegedly usurious interest charges is provided in 12 U.S.C. § 86 which, likewise, preempts the operation of any state law remedy. See *American Timber and Trading Co. vs. First National Bank of Oregon* (10 Cir. 1975) 511 F. 2d 930 cert. denied 955 Ct. 1588; *First National Bank of Mena vs. Nowlin* (8 Cir. 1975) 509

F. 2d 872; *American Auto Ins. vs. Albert* (D. Minn. 1952) 102 F. Supp. 542.

- 12) The temporary restraining order issued by the district court effectively deprives defendant First of Omaha Service Corporation of its right to engage in the limited activities it performs in connection with the credit card program directed by the First National Bank of Omaha; the restraining order would effectively require the First National Bank of Omaha to conform to Minnesota Statutes §48.185 before the defendant Service Corporation could continue those activities, thus indirectly depriving the First National Bank of Omaha of a right guaranteed to it by federal law, 12 U.S.C. §85.
- 13) The temporary restraining order, furthermore, has been issued solely upon the alleged authority of Minnesota Statutes §48.185 Subd. 7 (providing for injunctive relief under some circumstances); all state law remedies against a national bank for allegedly excessive interest rates have been preempted by 12 U.S.C. §86.
- 14) The temporary restraining order was, therefor, issued without jurisdiction and in direct contravention to the Supremacy Clause of the U.S. Constitution; in addition, the action of the district court relates to a matter that is decisive of the case. Prohibition is the appropriate remedy. See Advisory Committee Note to Rule 120, Rules of Civil Appellate Procedure.
- 15) The action of the district court deprives the defendant and its parent bank of the right to exercise a clear and settled federal statutory and constitutional right for which no adequate remedy exists necessitating the extraordinary relief prayed for herein.



16) The security bond of \$10,000 ordered by the district court is grossly inadequate.

WHEREFORE, the petitioner prays for a writ of prohibition restraining the District Court from enforcing the temporary restraining order issued by the District Court on December 22, 1976 and vacating the same.

Dated: December 27, 1976.

MACKALL, CROUNSE  
& MOORE

By Clay R. Moore  
1000 First National  
Bank Building  
Minneapolis, Minn. 55402  
Attorney for petitioner,  
First of Omaha Service  
Corporation

STATE OF MINNESOTA  
IN SUPREME COURT

File No. 47409

FIRST OF OMAHA SERVICE CORPORATION,  
Defendant-Petitioner,  
vs.  
THE MARQUETTE NATIONAL BANK OF  
MINNEAPOLIS,  
Plaintiff-Respondent,  
and  
WARREN SPANNAUS, Attorney General,  
State of Minnesota,  
Applicant for Intervention.

MOTION TO INTERVENE

To: The Supreme Court of the State of Minnesota; defendant-petitioner above-named and its attorney, Clay R. Moore, Esquire, Mackall, Crouse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota, 55402; and plaintiff-respondent above-named and its attorneys, John Troyer and Patrick McDavitt, Esquire, Levitt, Palmer, Bowen, Bearmon, & Rotman, 500 Roanoke Building, Minneapolis, Minnesota, 55402.

PLEASE TAKE NOTICE that on December 30, 1976, Warren Spannaus, Attorney General for the State of Minnesota, will move for an order of the Court permitting the Attorney General to intervene as a party defendant in the above-captioned action. The grounds for this motion are that the defendant-petitioner has raised a question as to the validity of Minn. Laws 1976, chapter 196, § 5, subd. 3 (codi-

fied as Minn. Stat. § 48.185, subd. 3) as applied to national banks chartered in states outside of Minnesota and the interests of the State of Minnesota require intervention on its behalf by the Attorney General. This question is presented in the letter from Clay R. Moore attached hereto as Exhibit A, and the temporary restraining order and memorandum entered December 22, 1976, by the trial court and attached hereto as Exhibit B.

Dated: December 29, 1976.

WARREN SPANNAUS

Attorney General

State of Minnesota

RICHARD B. ALLYN

Solicitor General

By STEPHEN SHAKMAN

Special Assistant

Attorney General

160 State Office Building

Saint Paul, Minnesota 55155

Telephone: (612) 296-2961

Attorneys for Applicant for

Intervention

STATE OF MINNESOTA  
IN SUPREME COURT

File No. 47409

FIRST OF OMAHA SERVICE CORPORATION,  
Defendant-Petitioner,

vs.

THE MARQUETTE NATIONAL BANK OF  
MINNEAPOLIS,

Plaintiff-Respondent,

and

WARREN SPANNAUS, Attorney General,  
State of Minnesota,

Applicant for Intervention.

CORRECTION TO MOTION TO INTERVENE

In the fourth line of the Motion to Intervene, the word "defendant" should be struck and the word "plaintiff" inserted in its place. In other words, the Attorney General seeks intervention as a party plaintiff.

STEPHEN SHAKMAN

Special Assistant

Attorney General

160 State Office Building

St. Paul, Minnesota 55155

Telephone: (612) 296-2961

Attorneys for Applicant for

Intervention

## EXHIBIT A

STATE OF MINNESOTA  
IN SUPREME COURT

File No. 47409

FIRST OF OMAHA SERVICE CORPORATION,  
Petitioner-Defendant,  
v.  
MARQUETTE NATIONAL BANK,  
Respondent-Plaintiff,  
and  
STATE OF MINNESOTA,  
Respondent-Intervenor.

## ORDER

Based upon all the files, records, and proceedings herein,  
IT IS HEREBY ORDERED that petitioner First of Omaha  
Service Corporation's petition for a writ of prohibition be,  
and the same is denied.

It is anticipated that a hearing for a temporary injunction  
will be held in the very near future in the district court, Rule  
65.01 and 65.02, Rules of Civil Procedure, and any appeal  
taken from the results of that hearing pursuant to Rule  
103.03(a), Rules of Civil Appellate Procedure, will be de-  
termined by this court on an expedited basis.

Dated: December 31, 1976.

By the Court  
ROBERT J. SHERAN  
Chief Justice

STATE OF MINNESOTA  
County of Hennepin

DISTRICT COURT  
Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
and CREDIT BUREAU OF ST. PAUL, INC.,  
Defendants.

NOTICE OF MOTION AND  
MOTION TO INTERVENE

To: The Hennepin County District Court; plaintiff above-  
named and its attorneys, John Troyer and Patrick McDavitt,  
Esquire, Levitt, Palmer, Bowen, Berman & Rotman, 500  
Roanoke Building, Minneapolis, Minnesota 55402; and de-  
fendants above-named and their attorneys, Clay R. Moore,  
Esquire, Mackall, Crounse & Moore, 1000 First National  
Bank Building, Minneapolis, Minnesota 55402 and James  
Brehl, Esq., Maun, Hazel, Green, Hayes, Simon & Aretz,  
332 Hamm Building, St. Paul, Minnesota.

PLEASE TAKE NOTICE that on January 7, 1977, at 3:00  
p.m., or as soon thereafter as counsel can be heard, in Room  
1659 of the Hennepin County Courthouse, Minneapolis, Min-  
nesota, Warren Spannaus, Attorney General for the State of  
Minnesota will move for an order of the Court permitting the  
State of Minnesota by its Attorney General to intervene pur-  
suant to Minn. R. Civ. P. 24 as a party plaintiff in the above-



captioned action in order to assert the claims set forth in the proposed complaint, a copy of which is attached hereto as Exhibit C. The grounds for this motion are that the defendants have raised a question as to the validity of Minn. Laws 1976, ch. 196, §5 (codified as Minn. Stat. §48.185) as applied to national banks chartered in states outside of Minnesota, and the interests of the State of Minnesota require intervention on its behalf by the Attorney General. This question is presented in a letter from Clay R. Moore attached hereto as Exhibit A, and in the temporary restraining order and memorandum entered December 22, 1976, by this Court and attached hereto as Exhibit B.

Dated: January 7, 1977.

WARREN SPANNAUS  
Attorney General  
RICHARD B. ALLYN  
Solicitor General  
THOMAS R. MUCK  
Assistant Attorney General  
RODERICK I. MACKENZIE  
Special Assistant Attorney  
General  
500 Metro Square Building  
St. Paul, Minnesota 55101  
Telephone: (612) 296-6524  
Attorneys for Applicant  
for Intervention

# EXHIBIT C

State of Minnesota  
County of Hennepin

District Court  
Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

and

WARREN SPANNAUS, Attorney General,  
State of Minnesota,

Plaintiff-Intervenor,

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
and CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

## COMPLAINT OF PLAINTIFF-INTERVENOR

Plaintiff-intervenor for his complaint herein, states and alleges as follows:

### PARTIES

1. Plaintiff-intervenor is the State of Minnesota represented by its duly elected Attorney General who brings this action pursuant to Minn. Stat. §8.01 (1974) and other applicable law.

2. Defendant, first of Omaha Service Corporation (hereinafter the "Omaha Service Corporation"), is a corporation and wholly-owned subsidiary of the First National Bank of Omaha, organized under the laws of the State of Nebraska, qualified to do business and doing business in the State of Minnesota,

and having its principal office in the City of Omaha, State of Nebraska.

3. Defendant, Credit Bureau of St. Paul, Inc. (hereinafter the "Credit Bureau"), is a corporation organized under the laws of the State of Minnesota having its principal office in the City of St. Paul, County of Ramsey, State of Minnesota.

#### CLAIM

4. Beginning on or about November, 1975, the First National Bank of Omaha and the Omaha Service Corporation commenced a continuous and systematic solicitation campaign in the State of Minnesota urging Minnesota residents to apply for the BankAmericard credit card issued by the First National Bank of Omaha. In connection therewith, the First National Bank of Omaha and the Omaha Service Corporation took steps on or about November 14, 1975, to have the Omaha Service Corporation qualified to do business in the State of Minnesota. In the course of, and as part of, said solicitation campaign, defendant Credit Bureau has participated in said campaign as a soliciting agent on behalf of the First National Bank of Omaha and the Omaha Service Corporation in the State of Minnesota.

5. The aforesaid solicitation campaign conducted by the defendants and the First National Bank of Omaha has been accomplished by various means including, without limitation, mass mailings of brochures and applications, as well as telephonic solicitation, to Minnesota residents.

6. Under the BankAmericard program operated by defendants and the First National Bank of Omaha, the First National Bank of Omaha issues credit cards and extends credit to residents of the State of Minnesota under an open credit arrangement as described in Minn. Stat. §48.185, subd. 6: 1) The First National Bank of Omaha and defendants induce

Minnesota residents to enter into open end credit cards credit transactions by a continuous and systematic solicitation personally, through agents, and by mail, 2) Retail merchants and banks within the State of Minnesota are contractually bound to honor the BankAmericard credit cards issued by the First National Bank of Omaha, 3) Goods, services and loans are delivered or furnished to residents in the State of Minnesota as a result of purchases made through the use of BankAmericard credit cards issued by the First National Bank of Omaha, and 4) Payment for such goods, services and loans is made by residents from the State of Minnesota.

7. Since the First National Bank of Omaha collects a finance charge from its Minnesota customers wishing to defer payment that is at a rate which exceeds the Minnesota statutory maximum of one percent per month, and is computed on a basis which exceeds the average daily balance method, Minnesota residents have been induced to enter into the First National Bank of Omaha's BankAmericard program under credit terms which violate Minn. Stat. §48.185 (Minn. Laws 1976, ch. 196, §5.).

8. By reason of their participation in the aforesaid continuous and systematic solicitation campaign in the State of Minnesota and their participation with the First National Bank of Omaha in the operation of said BankAmericard program, the Omaha Service Corporation and the Credit Bureau, and each of them, have violated, and have conspired with the First National Bank of Omaha to violate Minn. Stat. §48.185 (Minn. Laws 1976, ch. 196, §5.).

9. By reason of their participation in the aforesaid continuous and systematic solicitation campaign in the State of Minnesota and their participation with the First National Bank of Omaha in the operation of said BankAmericard pro-

gram, the Omaha Service Corporation and the Credit Bureau have exacted, and have conspired with the First National Bank of Omaha to exact, usurious interest from the citizens of Minnesota. This taking of usurious interest has resulted in a public nuisance which has caused substantial injury to the public and which clearly is contrary to Minnesota public policy.

WHEREFORE, plaintiff-intervenor respectfully prays for an order of this Court:

1. Declaring the BankAmericard program of the First National Bank of Omaha and the defendants to be in violation of Minn. Stat. §48.185.

2. Declaring that Minn. Stat. §48.185 is valid and fully applicable to the First National Bank of Omaha and the defendants herein in the operation of their BankAmericard program in Minnesota.

3. Directing the Omaha Service Corporation to credit the accounts of those Minnesota citizens who have paid BankAmericard finance charges exceeding one percent per month on the average daily balance to the First National Bank of Omaha the amounts of those finance charges which have exceeded one percent per month on the average daily balance.

4. Enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or co-operation with them or at their direction, from all solicitation in the State of Minnesota for the BankAmericard program of the First National Bank of Omaha until such time as the program is changed to conform to the requirements of Minn. Stat. §48.185.

5. Enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or co-operation with them or at their direction, from charging or collecting any finance charge from residents of the State of

Minnesota under the BankAmericard program of the First National Bank of Omaha except a finance charge no greater than one percent per month (and annual percentage rate of twelve percent) which is to be computed on the basis of the average daily balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his BankAmericard account.

6. Awarding plaintiff-intervenor costs and disbursements herein, including reasonable attorneys' fees.

7. Awarding plaintiff-intervenor such other relief as appears to the Court to be necessary or just.

Dated: January 7, 1977.

WARREN SPANNAUS

Attorney General

RICHARD B. ALLYN

Solicitor General

THOMAS R. MUCK

Assistant Attorney General

RODERICK I. MACKENZIE

Special Assistant Attorney  
General

500 Metro Square Building

St. Paul, Minnesota 55101

Telephone: (612) 296-6524

Attorneys for the State  
of Minnesota



STATE OF MINNESOTA                      DISTRICT COURT  
County of Hennepin                      Fourth Judicial District

\_\_\_\_\_  
Civil File No. 726526  
\_\_\_\_\_

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
Plaintiff,

vs.

FIRST OF OMAHA CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,  
Defendants.

\_\_\_\_\_  
ORDER ALLOWING INTERVENTION

The above matter came duly on for hearing before the undersigned Judge of the above-named Court on the 7th day of January, 1977, upon the motion of Roderick I. Mackenzie, Special Assistant Attorney General, appearing for the State of Minnesota and Warren Spannaus, its Attorney General.

Upon all the records and files herein, the proposed complaint of the applicant for intervention, and the stipulation of the parties hereto, the Court, being duly advised in the premises, now makes and enters the following Order:

IT IS HEREBY ORDERED that Warren Spannaus, Attorney General of the State of Minnesota, has leave to intervene in this matter and assert his claim and be made a party plaintiff hereto.

IT IS FURTHER ORDERED that the proposed complaint of the Attorney General may stand as his complaint and that defendants have 20 days after the filing of this Order to plead or otherwise respond with respect thereto.

Dated: January 7, 1977.

By the Court  
RICHARD J. KANTOROWICZ  
Judge of District Court  
\_\_\_\_\_

STATE OF MINNESOTA                      DISTRICT COURT  
County of Hennepin                      Fourth Judicial District

\_\_\_\_\_  
Civil File No. 726526  
\_\_\_\_\_

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION and  
CREDIT BUREAU OF ST. PAUL, INC.,  
Defendants.

\_\_\_\_\_  
NOTICE OF MOTION AND MOTION FOR PARTIAL  
SUMMARY JUDGMENT OR TEMPORARY  
INJUNCTION

To: First of Omaha Service Corporation and Clay R. Moore,  
Esq., 1000 First National Bank Building, Minneapolis, Minnesota 55402, its attorney

You and each of you will please take notice that on Friday, January 7, 1977, at 3:00 p.m., or as soon thereafter as counsel may be heard, plaintiff will bring on for hearing before the Honorable Richard J. Kantorowicz of the above-named Court, at the Hennepin County Government Center, Minneapolis, Minnesota, a motion for an order:

- (1) Pursuant to Rule 56.01 of the Minnesota Rules of Civil Procedure ("MRCF") for partial summary judgment declaring the BankAmericard program solicited

by defendant as being in violation of Minnesota Statutes, § 48.185 and permanently enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185; or, in the alternative,

- (2) Pursuant to Rule 65.02 MRCP for a temporary injunction enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

This motion is based upon all of the files, records and proceedings herein, together with the stipulation of uncontested facts to be submitted jointly by the parties hereto.

Dated: January 4, 1977.

Respectfully submitted,  
 LEVITT, PALMER, BOWEN,  
 BEARMON & ROTMAN  
 John Troyer  
 J. Patrick McDavitt  
 By J. PATRICK McDAVITT  
 Attorneys for Plaintiff  
 The Marquette National Bank  
 of Minneapolis  
 500 Roanoke Building  
 Minneapolis, Minnesota 55402  
 Telephone: 339-0661

STATE OF MINNESOTA  
 County of Hennepin

DISTRICT COURT  
 Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
 OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION and  
 CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

#### STIPULATION OF FACTS

Plaintiff Marquette National Bank and the defendant First of Omaha Service Corporation, through their respective counsel of record, hereby stipulate and agree that the following facts are true and correct:

#### I

The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue, BankAmericard credit cards to Minnesota residents who qualify for them.

#### II

Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its princi-

pal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

### III

Defendant First of Omaha Service Corporation will participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. A copy of the Agreement governing the contractual arrangement between the First National Bank of Omaha and defendant First of Omaha Service Corporation is attached hereto as Exhibit "A"; a copy of the standard agreement between defendant First of Omaha Service Corporation and a merchant is attached hereto as Exhibit "B"; a copy of the standard Agreement between defendant First of Omaha Service Corporation and a bank is attached hereto as Exhibit "C". While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

### IV

The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation

program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. The form of BankAmericard application heretofore utilized in such Minnesota solicitation campaign is attached hereto as Exhibit "D". The form to be utilized in the future is attached as Exhibit "D-1". Exhibit "D-1" describes the BankAmericard program of the First National Bank of Omaha and sets forth the terms and conditions under which BankAmericard credit cards will be issued to Minnesota cardholder residents, including the finance charge rate structure.

### V

Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant in his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

### VI

The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1-1/2% per month on the first \$999.99 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of \$1,000 and more for an annual percentage rate of 12%. As stated in Exhibit "D-1", the finance charges assessed by the



First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

#### VII

The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

#### VIII

The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Re-

vised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. §85.

#### IX

The plaintiff the Marquette National Bank of Minneapolis ("Marquette") is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

#### X

Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. A copy of the current Marquette BankAmericard Application form utilized in Marquette's BankAmericard program, which is attached hereto as Exhibit "E", describes Marquette's BankAmericard program and sets forth the terms and conditions under which Marquette BankAmericard credit cards will be issued to Minnesota cardholder residents, including the finance charge rate structure.

#### XI

Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section

48.185, the plaintiff Marquette has assessed charges to connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition a finance charge equal to 1% per month (12% annual percentage rate). As stated in Exhibit "E", the finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that there the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance.

Dated: January 7, 1977.

LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

By John Troyer

J. Patrick McDavitt

Attorneys for Plaintiff The

Marquette National

Bank of Minneapolis

500 Roanoke Building

Minneapolis, Minnesota 55402

Telephone 339-0661

MACKALL, CROUNSE,  
& MOORE

By Clay R. Moore

Attorneys for Defendant

First of Omaha Service

Corporation

1000 First National

Bank Building

Minneapolis, Minnesota 55402

Telephone 333-1341

# EXHIBIT A

This agreement made and entered into between First National Bank of Omaha, hereinafter called "Bank" and First of Omaha Service Corporation, hereinafter called Service Corporation,

WHEREAS Bank has been licensed by BankAmerica Service Corporation to use the servicemarks, "BankAmericard" and the "Blue, White and Gold Bands," certain written materials and technical information hereinafter collectively called "BankAmericard Plan" and to offer BankAmericard Services, and

WHEREAS Bank desires to actively promote and expand the BankAmericard Plan in various states, including Nebraska, Iowa and South Dakota, and

WHEREAS Service Corporation has been organized by Bank for the purpose of promoting and expanding said plan, and Bank has, sponsored Service Corporation for a license to be granted by BankAmerica Service Corporation to use said service marks and BankAmericard Plan, which license shall be upon such terms and conditions as may be set forth therein, and

WHEREAS this agreement shall be of no force or effect until said license is granted and accepted;

NOW THEREFORE it is mutually covenanted and agreed between the parties hereto:

1. Service Corporation will actively solicit Merchant Members for the BankAmericard Plan in the States of Nebraska, Iowa, and South Dakota. Such Merchant Members will be enrolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. Such Merchant Members will be selected in accordance with quality standards to be established from time to time by Bank.

2. In performing its obligations hereunder Service Corporation will cooperate with and seek the assistance of other banks and will actively solicit such other banks to enter in agency bank agreement with it upon the terms and conditions set forth in the agency bank agreement attached hereto as Exhibit B.

3. Service Corporation will at all times maintain an adequate supply of BankAmericard forms and supplies and will furnish such materials, forms, supplies and equipment to Merchant Members and agent banks as required.

4. Service Corporation will assist Merchant Members and agent banks in their BankAmericard Plan operations.

5. Service Corporation will actively solicit and obtain applications for BankAmericard and will forward such applications to Bank for its approval. Upon approval of such applications by Bank at Omaha, Nebraska, Bank will issue BankAmericards and deliver them to Service Corporation at Omaha, Nebraska. Service Corporation shall promptly deliver such cards to the persons named thereon.

6. Bank will accept, at Omaha, Nebraska, through regular banking channels, all valid, properly executed sales drafts and cash advance drafts resulting from the use of any valid, unexpired, properly tendered credit card bearing either of said service marks which was issued by any licensee of Bank-America Service Corporation or by Bank America National Trust and Savings Association presented to it by Merchant Members and agent banks enrolled by Service Corporation as herein provided for and upon the terms and conditions set forth in Exhibits A and B.

7. As compensation hereunder Bank will pay to Service Corporation \$1,000.00 per month.

8. Service Corporation shall collect and retain all Merchant Members enrollment fees.

9. Bank will keep accurate books and records concerning all transactions originating with Merchant Members and Agent Banks enrolled by Service Corporation and will, upon request of Service Corporation, furnish such information as Service Corporation shall reasonably require.

10. Bank will, at Service Corporation's request, transfer to Service Corporation any BankAmericard sales draft which originated with a Merchant Member or Agent Bank enrolled by Service Corporation. The consideration for such transfer shall be the amount Bank paid for the draft by Bank.

11. Service Corporation will, at Bank's request, acquire:

a. Any BankAmericard Sales draft which has not been paid by the cardholder and which originated with a Merchant Member enrolled by Service Corporation and concerning which

- (1) merchandise has been returned whether or not a credit voucher has been delivered to Service Corporation, or
- (2) any sales transaction exceeds the dollar limitation and which has not otherwise been specifically authorized by Bank, or
- (3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority, or
- (4) the sales draft is illegible, or
- (5) the BankAmericard holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft accepted by such holder or authorized user, or
- (6) the sales draft was drawn by, or depository credit given to a Merchant Member in circumstances con-



stituting a breach of any term, condition, representation, warranty, or duty of the Merchant Member under Exhibit A, or

- (7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

b. Any instant cash voucher which originated with an Agent Bank concerning which

- i. the draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or
- ii. the draft is illegible, or
- iii. the draft is alleged to have been drawn improperly without authority, or
- iv. the BankAmericard was invalid at the time the draft was drawn as determined by the card's format and current void lists provided by Service Corporation.

c. Any such sales draft or drafts totaling not more than \$\_\_\_\_\_ in the aggregate.

The transfer price shall be those amounts paid by Bank for such draft or drafts.

12. Except in the case of sales drafts acquired by Service Corporation in accordance with paragraphs 10 and 11 of this agreement, Bank shall have the sole right to receive payment on sales drafts accepted by it. Service Corporation agrees not to sue or make any collections thereon except as specifically authorized or requested by Bank. In the event of such authorization or request, Service Corporation agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

13. For purposes of this agreement, Merchant Members enrolled by Agent Banks shall be deemed to have been enrolled by Service Corporation if Service Corporation enrolled the Agent Bank.

14. This agreement shall become effective upon execution and shall continue until terminated;

- a. By 60 days written notice from either party which may be given at any time, or
- b. The expiration or termination of the agreement between Bank and BankAmerica Service Corporation, or
- c. The expiration or termination of the license granted by BankAmerica Service Corporation to Service Corporation.

termination shall continue until they are completely fulfilled or performed.

15. This agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

16. The only parties to this agreement are Bank and Service Corporation. BankAmerica Service Corporation, Agent Banks and Merchant Members are not parties hereto and shall have no rights hereunder. Each party to this agreement acts as a principal and not as an agent for any other person, firm or corporation. Neither party hereto is an agent for the other and nothing in this agreement shall be construed as creating an agent-principal relation between them.

17. All of Bank's duties and obligations under this agreement are to be performed at Omaha, Nebraska.

First of Omaha Service Corp.  
First National Bank of Omaha

Dated: ?-??-68

**EXHIBIT B**  
**BANKAMERICARD®**  
**Member Agreement**

Undersigned, hereinafter called Member, whose principal place of business is \_\_\_\_\_, desires to honor BankAmericards and all other "Qualified Cards" as defined in this Agreement in connection with sales of merchandise or services, and will from time to time offer to First National Bank of Omaha, through regular banking channels, sales drafts relating to such transactions for acceptance.

1. First National Bank of Omaha is not a party to this agreement.

2. The term "Card" as used in this Agreement, and whether singular or plural, shall mean only a "Qualified Card". A "Qualified Card" is any credit card conforming to the standards established by National BankAmericard Incorporated or BankAmerica Service Corporation, which card may or may not bear the name "BankAmericard" but which must bear the Blue, White and Gold Bands Design and an embossed "BAC" on the face of the card.

3. Member represents and warrants that all statements of fact within the knowledge of Member or concerning which Member has actual or constructive notice and which are contained in applications submitted by it to First of Omaha Service Corporation, hereafter called Service Corporation, are true.

4. Member will honor any valid Card properly tendered for use. Member will check each Card for validity and currency, to be determined by the Card's format and such current void lists as are provided by Service Corporation. If the total amount of any sales transaction is in excess of a dollar limita-

tion imposed by Service Corporation, Member will telephone Service Corporation's authorization facility and obtain specific authorization to draw a sales draft relating thereto, and such authorization shall be noted by Member in the appropriate place on the sales draft. All sales drafts, and credit vouchers will be on forms supplied by Service Corporation, and will be completed to include the name of the Card holder, his account number, the name of the authorized user, the date, a description of the merchandise sold or service rendered, and the total cash price of the sale. One copy of the sales draft (or credit voucher) will be delivered to the holder or authorized user of the Card. All sales drafts tendered to First National Bank of Omaha, by Member will represent obligations of a Card holder in amounts set forth therein for merchandise sold or services rendered only and shall not involve any element of credit for any other purpose. Member agrees to indemnify and hold Service Corporation and First National Bank of Omaha, harmless from any claim relating to any sales draft accepted by First National Bank of Omaha or acquired by Service Corporation, interposed by way of defense, dispute, offset or counterclaim. Member represents and warrants that as of the date any sales draft is placed in regular banking channels for tender to First National Bank of Omaha, Member has no knowledge or notice that would impair the validity of the sales draft or its collectibility. Member will make no special charge nor extract any special agreement, conditions or security from a Card holder in connection with any sales draft.

5. Member will establish a fair policy for the exchange and return of merchandise and for adjustment for services rendered, and will give proper credit or refund for all such returns and will issue credit vouchers therefor. Members will

deliver one copy of the credit voucher to the Cardholder and will forward one copy of the credit voucher to Service Corporation together with payment to the order of Service Corporation of the net amount received by member for the sales draft to which the credit voucher relates. All credit vouchers will be forwarded by United States mail on or before the third banking business day after they are issued.

6. Member will forward all sales drafts for acceptance through regular banking channels and in deposit envelopes and with other forms provided by the Service Corporation. Member will deposit separately all sales drafts relating to Card holders whose account numbers are prefixed with the number 4418. All sales drafts will be deposited pursuant to instructions from Service Corporation.

7. Service Corporation will provide Member with an appropriate number of sales draft imprinters, which will remain the exclusive property of Service Corporation. Member shall return such imprinters in good condition to Service Corporation upon termination of this Agreement. Member will pay an annual Service and Maintenance Fee as established from time to time by Service Corporation.

8. Service Corporation represents that First National Bank of Omaha has agreed to accept Card sales drafts presented to it through regular banking channels at such discount as is agreed upon between Member and Service Corporation from time to time. Each sales draft shall be placed in regular banking channels by Member on or before the third banking business day following the date of issuance. All such sales drafts will be endorsed by Member prior to placing them in regular banking channels, any holder of any of such drafts is authorized to place member's endorsement thereon. Member shall and hereby does waive notice of default or nonpayment, pro-

test or notice of protest, demand for payment and any other demands or notices in connection with this agreement or any Sales Draft and Member consents to extensions of time granted, or compromise made, with any Card holder liable on any sales draft without affecting Member's liability thereon or under this agreement. In the event that First National Bank of Omaha fails to accept any such draft when tendered to it in compliance with this agreement, Service Corporation agrees, upon delivery thereof to it to pay the net amount thereof to Member.

9. Member agrees to pay to Service Corporation the net amount of any sales draft where: (1) merchandise is returned, whether or not a credit voucher is delivered to Service Corporation; (2) any sales transaction exceeds the dollar limitation of the Card and which has not otherwise been specifically authorized by Bank; (3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority; (4) the sales draft is illegible; (5) the Card holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft accepted by such a holder or authorized user; (6) the sales draft was drawn by, or depository credit given to, member in circumstances constituting a breach of any term, condition, representation, warranty, or duty of Member hereunder; or (7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

10. First National Bank of Omaha shall have the sole right to receive payments on sales drafts accepted by it. Member agrees not to sue or to make any collections thereon, except as may be specifically authorized by First National Bank



of Omaha. In the event of such authorization, Member agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

11. This Agreement shall become effective on the date indicated and shall remain in full force and effect until terminated by written notice. Either party may terminate this Agreement upon such written notice at any time. All obligations of Member incurred or existing under this Agreement as of the date of termination shall survive such termination. This Agreement shall be binding upon the parties hereto, their successors or assigns.

Member .....

Address .....

By .....

Accepted: .....

By .....

FIRST OF OMAHA SERVICE CORPORATION

Date .....

### EXHIBIT C

#### AGENT BANK AGREEMENT

This agreement made and entered into between First of Omaha Service Corporation, hereinafter called Service Corporation and

hereinafter called Bank,

WITNESSETH:

WHEREAS, Service Corporation has been licensed by National BankAmericard Incorporated to use the service marks, BankAmericard, and "Blue, White and Gold Bands", certain written material and technical information and "know-how" collectively called BankAmericard Plan, and to promote and expand the BankAmericard Plan and credit card services thereunder, and

WHEREAS, Bank desires to offer BankAmericard services to citizens and merchants in its community, NOW THEREFORE

IT IS MUTUALLY covenanted and agreed between the parties hereto:

1. On behalf of and as agent for National BankAmericard Incorporated, Service Corporation hereby sponsors Bank for a license to use said service marks and written materials in offering credit card services, upon terms and conditions to be set forth by National BankAmericard Incorporated in granting the license. This agreement shall not take effect until the license is granted to you by National BankAmericard Incorporated.

2. National BankAmericard Incorporated is not a party to this agreement and it has no responsibility hereunder with respect to the performance by the parties hereto of their duties and obligations.

3. Bank agrees to accept and comply with all of the terms and conditions of the licenses as set forth by National BankAmericard Incorporated.

4. This agreement will automatically terminate upon any affirmative act of insolvency by Service Corporation or Bank, or the filing by Service Corporation or Bank of any petition or action under any bankruptcy, reorganization, insolvency or moratorium law; or upon the filing of any voluntary petition under a bankruptcy statute by Service Corporation or Bank, or the appointment of any Receiver or Trustee to take possession of the properties of Service Corporation or Bank.

This agreement shall automatically terminate if the separate agreement between Service Corporation and First National Bank of Omaha is terminated or if National BankAmericard Incorporated terminates or revokes Service Corporation's

license. Except for events which result in automatic termination, this agreement may not be terminated without 90 days written notice by either party from the date hereof. Provided however, Service Corporation may terminate this Agreement upon breach of any provision hereof by Bank, upon giving Bank thirty days written notice of its intention to terminate and the reasons therefore unless Bank remedies such breach within twenty days after receipts of such notice. Upon termination for any reason whatsoever, Bank shall deliver all BankAmericard materials and supplies to Service Corporation and shall make no other or further use thereof. The obligations of the parties hereto in effect at the date of termination hereof shall continue until they are fully performed or satisfied.

5. Bank will actively solicit Merchant Members for the BankAmericard Plan. Such Merchant Members will be enrolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. They shall be selected in accordance with quality standards to be established from time to time by Service Corporation. Service Corporation will assist Bank in soliciting and enrolling Merchant Members and may enroll Merchant Members independently of Bank.

6. Bank will assist Merchant Members in its community in the promotion and execution of the BankAmericard Plan and will maintain continuous contact with and supervision of such Merchant Members in their BankAmericard Plan operations.

7. Bank will mail applications in their regular bank mailings (demand accounts), etc., within 90 days after signing. All inserts to be furnished by Service Corporation.

8. Bank will process all sales draft deposit envelopes submitted to it by Merchants Members, ascertain that they com-

ply with Service Corporation's instructions, and forward them through regular banking channels to First National at Omaha, Nebraska.

9. Service Corporation will supply Bank with BankAmericard forms and supplies and Bank will furnish such materials, forms, supplies and equipment to Merchant Members in its community as is required.

10. Bank will honor any valid BankAmericard properly tendered for use and will advance such amounts of cash to the holder thereof as do not exceed a dollar limitation imposed by Service Corporation. If the holder of such BankAmericard requests cash in excess of such limitation, Bank will telephone Service Corporation's authorization facility and obtain specific authorization to draw a draft in relation thereto and such authorization shall be noted by Bank in the appropriate place on the draft.

11. Service Corporation represents that First National of Omaha has agreed to accept BankAmericard Sales and Cash Advance drafts presented to it through regular banking channels and in accordance with the terms hereof at such discount as is agreed to by Service Corporation from time to time.

12. Bank agrees to purchase from Service Corporation:

- a. Any cash advance draft which originated with Bank and concerning which
  - i. The draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or
  - ii. The draft is illegible, or
  - iii. The draft is alleged to have been drawn improperly or without authority, or
  - iv. The BankAmericard was invalid at the time the draft was drawn as determined by the card's for-

mat and current void lists provided by Service Corporation.

13. Service Corporation will pay to Bank as compensation for its services hereunder an amount equal to 20% of the net merchant discount on sales drafts forwarded to First National of Omaha by Merchant Members in Bank's community and \$.50 for each cash advance transaction.

14. Service Corporation will furnish Bank from time to time with advertising materials and supplies such as radio tapes, newspaper mats and copy. Service Corporation shall make available to Bank other advertising materials at a reasonable cost from time to time.

15. Bank will not use any advertisements of any description without the prior approval of Service Corporation. All materials furnished by Service Corporation shall be deemed to be approved. Service Corporation will promptly approve or disapprove any material submitted by Bank.

16. The parties to this agreement are acting independently and nothing herein contained shall be construed to make either the agent, employee or principal of the other. Nor shall this agreement be construed as creating or establishing a partnership or a joint venture.

AGREED TO AND ACCEPTED this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

FIRST OF OMAHA SERVICE CORPORATION

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

STATE OF MINNESOTA  
County of Hennepin

DISTRICT COURT  
Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

and

WARREN SPANNAUS, Attorney General,  
State of Minnesota,

Plaintiff-Intervenor,

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
and CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

SEPARATE ANSWER AND CROSSCLAIM OF CREDIT  
BUREAU OF ST. PAUL, INC. TO THE COMPLAINT  
OF PLAINTIFF-INTERVENOR WARREN  
SPANNAUS, ATTORNEY GENERAL,  
STATE OF MINNESOTA

Defendant Credit Bureau of St. Paul, Inc. for its separate answer to the complaint of plaintiff-intervenor herein, alleges and states as follows:

I.

Except as hereinafter admitted, qualified, or otherwise answered, this answering defendant denies each and every allegation contained in said intervenor's complaint.

II.

Denies sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in



paragraphs 1 and 2 of the complaint, and therefore denies the same and puts the intervenor to its strict proof thereof.

### III.

Admits the allegations contained in paragraph 3 of intervenor's complaint.

### IV.

In answer to paragraph 4 of intervenor's complaint, this answering defendant admits that it has performed certain services for BankAmericard Division, First National Bank of Omaha, commencing on or about January 8, 1976 through on or about April 14, 1976 in connection with the offer of First National Bank of Omaha to consider applications for issuance of a BankAmericard credit card to certain persons residing in Ramsey, Dakota and Washington Counties in the State of Minnesota. This answering defendant denies that it was a soliciting agent on behalf of the First National Bank of Omaha and Omaha Service Corporation in the State of Minnesota as alleged in the intervenor's complaint. Upon information and belief, this answering defendant admits that the First National Bank of Omaha consideration of the making of the aforesaid offer commenced some time in or about November of 1975. This answering defendant denies sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph 4 of intervenor's complaint, and therefore denies the same and puts intervenor to its strict proof thereof.

### V.

In answer to paragraph 5 of intervenor's complaint, this answering defendant admits that as a part of the offer of defendant First National Bank of Omaha to consider applications for issuance of a BankAmericard credit card, copies of a form of letter and application were sent to certain persons

residing in Ramsey, Dakota and Washington Counties of the State of Minnesota, and admits that there occurred telephone communication with certain persons in the same 3 counties. This answering defendant denies that it has sufficient knowledge or information upon which to form a belief as to the truth of the remaining allegations of paragraph 5 of the complaint, and therefore denies the same and puts intervenor to its strict proof thereof.

### VI.

Denies sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraphs 6 and 7 of intervenor's complaint, except that it is denied that this answering defendant has done, has threatened to or will do any of the acts or things therein complained of, and therefore this answering defendant denies all of the allegations contained in said paragraphs 6 and 7, and puts intervenor to its strict proof thereof.

### VII.

Denies the allegations contained in paragraphs 8 and 9 of intervenor's complaint.

## AFFIRMATIVE DEFENSES

### VIII.

In further answer, intervenor's complaint fails to state a claim upon which relief can be granted against this answering defendant.

### IX.

In further answer, intervenor's complaint herein as to this answering defendant is sham and frivolous.

### X.

Alleges as defenses, estoppel, illegality of intervenor's complaint as to this answering defendant, the impropriety of the relief sought by intervenor as an unlawful restraint of trade, mootness, and duress.

**CROSSCLAIM AGAINST DEFENDANT  
FIRST OF OMAHA SERVICE CORPORATION**

Defendant Credit Bureau of St. Paul, for its crossclaim against defendant First of Omaha Service Corporation, alleges and states:

**XI.**

As part of its crossclaim and as set forth fully herein, defendant and crossclaimant Credit Bureau of St. Paul, Inc. realleges and restates all matters contained and stated hereinbefore in its answer to intervenor's complaint.

**XII.**

Defendant and crossclaimant Credit Bureau of St. Paul, Inc. is a Minnesota corporation having its principal place of business in the City of St. Paul, County of Ramsey, State of Minnesota.

**XIII.**

In the event it be found that this answering defendant and crossclaimant is liable or responsible to respond in damages to the claims of intervenor for any reason whatsoever, including the award of any costs and disbursements, or attorneys' fees, then this answering defendant and crossclaimant is entitled to full indemnity therefore from defendant First of Omaha Service Corporation, with such indemnity including all costs and disbursements herein incurred by this answering defendant and crossclaimant, including attorneys' fees.

WHEREFORE, this answering defendant and crossclaimant demands judgment as follows:

1. Against plaintiff-intervenor that said plaintiff-intervenor take nothing by its complaint herein against this answering defendant and crossclaimant, and that such complaint as to this answering defendant and crossclaimant be dismissed.

2. Against plaintiff-intervenor for this answering defen-

dant's costs and disbursements herein, including reasonable attorneys' fees.

3. In the event this defendant and crossclaimant be found liable to plaintiff-intervenor in any amount and for any reason whatsoever, that this defendant and crossclaimant have judgment upon its crossclaim herein for full indemnity from and by defendant First of Omaha Service Corporation, with judgment upon such crossclaim including indemnity for all costs and disbursements incurred herein by this defendant and crossclaimant, including its attorneys' fees; and that this answering defendant and crossclaimant have such other and further relief as appears to the Court to be just and proper.

Dated this 21 day of January, 1977.

MAUN, HAZEL, GREEN,  
HAYES, SIMON & ARETZ

By: JAMES W. BREHL

By: GARRETT E. MULROONEY

Attorneys for Credit Bureau  
of St. Paul, Inc.

332 Hamm Building

St. Paul, Minnesota 55102

Telephone: (612) 227-9231

MAUN, HAZEL, GREEN, HAYES,  
SIMON and ARETZ  
Attorneys at Law  
332 Hamm Building  
Saint Paul, Minnesota 55102  
227-9231  
Area Code 612

January 24, 1977

Mr. Roderick I. Mackenzie  
Special Assistant  
Attorney General  
Banking Division  
500 Metro Square Building  
St. Paul, Minnesota 55101

Re: The Marquette National Bank of Minneapolis and Warren Spannaus vs. First of Omaha Service Corporation and Credit Bureau of St. Paul, Inc.

Our File No. 18423

Dear Mr. Mackenzie:

Enclosed herewith and served upon you by United States mail please find Separate Answer and Crossclaim of Credit Bureau of St. Paul, Inc. to the Complaint of Plaintiff-Intervenor Warren Spannaus, Attorney General, State of Minnesota.

Very truly yours,  
JAMES W. BREHL

JWB:pl  
Enclosure

STATE OF MINNESOTA  
County of Hennepin

DISTRICT COURT  
Fourth Judicial District

CIVIL FILE NO. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

and

WARREN SPANNAUS, ATTORNEY GENERAL,  
STATE OF MINNESOTA,

Plaintiff-Intervenor,

vs.

FIRST OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

ANSWER OF FIRST OF OMAHA  
SERVICE CORPORATION TO CROSSCLAIM

For its answer to the cross claim of defendant Credit Bureau of St. Paul, Inc., the defendant First of Omaha Service Corporation pleads as follows:

I

Denies each and every allegation of the crossclaim not specifically admitted or otherwise responded to hereinafter.

II

Admits that defendant Credit Bureau of St. Paul, Inc. is a Minnesota corporation having its principal place of business in Ramsey County, Minnesota.

III

Alleges that during the period of time involved no relationship existed between the defendant First of Omaha Service



Corporation and the defendant Credit Bureau of St. Paul, Inc., contractual or otherwise, which would form the basis of a claim for indemnity; nor did the defendant First of Omaha Service Corporation commit any acts which would justify such claims for indemnity; this defendant therefor denies the allegations of Paragraph XIII of the cross claim.

WHEREFORE, this answering defendant prays that the defendant Credit Bureau of St. Paul, Inc. take nothing by its cross claim and that the defendant have its costs and disbursements.

Dated:

MACKALL, CROUNSE

& MOORE

By Clay R. Moore

Attorneys for Defendant

First of Omaha Service

Corporation

1000 First National

Bank Building

Minneapolis, Minnesota 55402

333-1341

Of Counsel:

William Morrow

Donald Buresh

SWARR, MAY, SMITH

& ANDERSON

3535 Harney Street

Omaha, Nebraska 68131

STATE OF MINNESOTA

County of Hennepin

DISTRICT COURT

Fourth Judicial District

CIVIL FILE NO. 726526

MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

and

STATE OF MINNESOTA, by

WARREN SPANNAUS, its Attorney General,

Plaintiff-Intervenor,

vs.

FIRST OF OMAHA SERVICE CORPORATION, et al.

Defendant.

ANSWER TO COMPLAINT  
OF PLAINTIFF-INTERVENOR

The defendant, First of Omaha Service Corporation, for its answer to the complaint of intervenor, responds as follows:

I

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

II

SECOND DEFENSE

The plaintiff-intervenor has failed to join an indispensable party, towit: The First National Bank of Omaha which cannot be made a party to this action by reason of Title 12 U.S.C. §94 governing venued action against National banks; pursuant to Rule 19.02, Minn. Rules of Civil Procedure, this action should be dismissed upon the grounds that it cannot, in equity

and good conscious, be permitted to proceed among the existing parties.

### III

#### THIRD DEFENSE

The finance charges challenged by the Complaint in Intervention are to be assessed, in connection with a Bank Americard credit card program, by the First National Bank of Omaha, a national bank, located in Omaha, Nebraska; the finance charges and interest rates permitted to be assessed by a national bank are governed exclusively by Title 12 U.S.C. §85, a part of the National Bank Act, and the remedies available against a national bank are governed solely by Title 12 U.S.C. §85; said sections 85 and 86 of Title 12 U.S.C. pre-empt the operation of any state law pertaining to finance charges of a national bank by reason of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, thereof; by reason thereof Minn. Stat. §48.185, which the intervenor alleges was violated, is a nullity and of no force and effect insofar as it purports to control finance charges assessed by the First National Bank of Omaha.

### IV

#### FOURTH DEFENSE

The Attorney General of the State of Minnesota lacks standing to assert the claims made or to seek the relief prayed for in the complaint in intervention.

### V

#### FIFTH DEFENSE

The Court lacks jurisdiction of the subject matter.

### VI

#### SIXTH DEFENSE

Insofar as the complaint in intervention seeks relief, declaratory or otherwise, which purports to be binding upon

the First National Bank of Omaha, this defendant asserts that the First National Bank of Omaha is not a party to this action, was dismissed as a party defendant on or about June 15, 1976 by the plaintiff Marquette and cannot be made a party to the action by reason of Title 12 U.S.C. §94; no relief purporting to bind the First National Bank of Omaha can, therefore be granted.

### VII

#### SEVENTH DEFENSE

This answering defendant denies each and every allegation of Paragraphs 1 through 9 of the complaint in intervention except as hereinafter specifically admitted or otherwise pleaded to:

(a) As to Paragraph 1 of the Complaint in Intervention, admits that the Attorney General represents the State of Minnesota herein and purports to intervene pursuant to Minn. Stat. §8.01.

(b) As to Paragraph 2 of the Complaint in Intervention, admits that defendant First of Omaha Service Corporation ("Omaha Service Corporation") is a Nebraska corporation, with its principal place of business in Omaha, Nebraska, and a wholly owned subsidiary of the First National Bank of Omaha, and holds a certificate of authority issued pursuant to Minn. Stat. Chapter 303, issued on November 14, 1975 but denies that it is doing business in the State of Minnesota.

(c) Admits the allegations of Paragraph 3 of the complaint in intervention.

(d) Admits that the defendant is qualified as a foreign corporation in the State of Minnesota; denies that the defendant solicited or urged Minnesota residents to apply for BankAmericard credit cards issued by the First National Bank of Omaha.

(e) As to this answering defendant, denies the allegations of Paragraph 5 of the complaint in intervention.

(f) As to Paragraph 6 of the complaint in intervention admits that the First National Bank of Omaha intends to issue BankAmericard credit cards and extend credit to residents of Minnesota under an arrangement which is generally characterized as an open end credit arrangement; admits that goods, service and loans are or may be delivered or furnished to residents of the State of Minnesota as a result of the use of said BankAmericard credit cards and that payment therefor is or may be made to the First National Bank of Omaha by said residents, denies the remaining allegations of Paragraph 6.

(g) Denies the allegations of Paragraph 7, 8, and 9 of the complaint in intervention.

WHEREFORE, this answering defendant prays that the plaintiff-intervenor take nothing by his pretended claim for relief and that defendant have its costs and disbursements herein.

Dated:

**MACKALL, CROUNSE  
& MOORE**

By Clay R. Moore

Attorneys for Defendant

First of Omaha Service  
Corporation

1000 First National

Bank Building

Minneapolis, Minnesota 55402

333-1341

Of Counsel:

William Morrow

Donald Buresh

SWARR, MAY, SMITH

& ANDERSON

3535 Harney Street

Omaha, Nebraska 68131

STATE OF MINNESOTA

County of Hennepin

DISTRICT COURT

Fourth Judicial District

Civil File No. 726526

**THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,**

Plaintiff,

vs.

**FIRST OF OMAHA SERVICE CORPORATION and  
CREDIT BUREAU OF ST. PAUL, INC.,**

Defendants.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER FOR PARTIAL SUMMARY JUDGMENT**

The above-entitled matter was heard by the Court on January 7, 1977, on the Motion of plaintiff for Partial Summary Judgment or Temporary Injunction, and presented to the Court upon a Stipulation of Facts by the parties, Affidavit of Dale Harris, and all the files, records and proceedings herein. John Troyer and J. Patrick McDavitt of Levitt, Palmer, Bowen, Bearmon & Rotman appeared on behalf of plaintiff The Marquette National Bank of Minneapolis; Clay R. Moore of Mackall, Crounse & Moore appeared on behalf of defendant



First of Omaha Service Corporation; and Rod McKenzie from the Office of the Attorney General appeared on behalf of Intervenor State of Minnesota.

Based upon the foregoing Motion, papers, files and arguments presented, the Court now enters the following Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment:

### FINDINGS OF FACT

#### I

The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card-issuing member in the BankAmericard plan, and as such has issued (prior to the entry of this Court's December 22, 1976 Temporary Restraining Order) and intends to issue (unless further enjoined) BankAmericard credit cards to Minnesota residents who qualify for them.

#### II

Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska, but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III below.

#### III

Defendant First of Omaha Service Corporation intends to participate in the system by entering into agreements with

Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

#### IV

The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks.

#### V

Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant in his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

## VI

The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1 1/2 percent per month on the first \$999.99 of the customer's account for an annual percentage rate of 18 percent, and 1 percent a month on amounts of \$1,000 and more for an annual percentage rate of 12 percent. The finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchase portion of the account balance when the previous months' total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

## VII

The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

## VIII

The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraphs III and IV above in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates would be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI above. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Sections 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 21 (L.B. No. 52), as amended, and other laws of Nebraska which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. §85.

## IX

Plaintiff The Marquette National Bank of Minneapolis ("Marquette") is asking for a temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

## X

Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them.

## XI

Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition, a finance charge equal to 1 percent per month (12 percent annual percentage rate). The finance charge of 1 percent per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's account during each monthly billing cycle; except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance.

## XII

The First National Bank of Omaha's BankAmericard program as conducted and operated in the manner described above, has resulted and will continue to result in competitive injury to The Marquette National Bank of Minneapolis and its BankAmericard program. The First National Bank of Omaha is able to offer the aforesaid BankAmericard program to Minnesota residents without a membership fee, and thereby induce customers away from Marquette, only because of the imposition and collection of finance charges of 1 1/2 percent per month from First National Bank of Omaha's BankAmericard holders in Minnesota.

## CONCLUSIONS OF LAW

### I

Nothing contained in the National Bank Act, 12 U.S.C. §85, precludes or preempts the application and enforcement of Min-

nesota Statutes, §48.185 to the First National Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota.

### II

The laws of the State of Minnesota, not the laws of the State of Nebraska, apply in determining the rate of interest permitted to be charged and collected by the First National Bank of Omaha from BankAmericard holders residing in the State of Minnesota.

### III

The First National Bank of Omaha's BankAmericard program, as offered and operated in the State of Minnesota, is in violation of Minnesota Statutes, §48.185, in that it provides for the collection of a periodic rate of finance charge in excess of 1 percent per month.

### IV

As agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha, has violated and threatens to continue to violate Minnesota Statutes, §48.185.

### V

The Marquette National Bank of Minneapolis, as a bank extending credit in compliance with Minnesota Statutes, §48.185, which has and will be injured competitively by viola-



tions of this statute, is entitled to a permanent injunction prohibiting any continued violation of said statute.

#### ORDER FOR PARTIAL SUMMARY JUDGMENT

There being no genuine issue as to any material fact, the Court does hereby order that, pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, judgment be entered in favor of The Marquette National Bank of Minneapolis and against defendant First of Omaha Service Corporation permanently enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

The Court expressly determines under Rule 54.02 of the Minnesota Rules of Civil Procedure that there is no just reason for delay for the entry of said judgment and that it be entered by the Clerk accordingly.

Dated: February 18th, 1977.

RICHARD J. KANTOROWICZ

Judge of District Court

#### MEMORANDUM

Plaintiff is a bank chartered under the National Banking Laws located in the State of Minnesota and brings this action for a permanent injunction restraining the defendants from soliciting BankAmericard customers in the State of Minnesota in violation of Minnesota Statutes 48.185. Defendant, First of Omaha Service Corporation, is the soliciting agent for the First National Bank of Omaha. Under the arrangement, the First of Omaha Service Corporation will merely solicit customers. The loans and credit will be extended by the First National Bank of Omaha. Because the First National Bank of

Omaha will not be soliciting customers in the State of Minnesota, they have not been joined as defendants at this stage of the proceedings.

Defendants are taking the position that First National Bank of Omaha, being chartered under the National Banking Act, enjoys all of the rights and privileges granted under that law and they may solicit business through its agents in Minnesota, offering interest rates which the First National Bank of Omaha could legally charge Minnesota residents.

The issue in this case is what is the legal rate of interest that the First National Bank of Omaha may charge Minnesota residents who subscribe to the BankAmericard plan offered by the First National Bank of Omaha.

The relevant provision of the National Banking Law is found in 12 U.S.C. §85.

"Any association (national bank) may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of State, Territory, or District where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for Banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

Under that provision of 12 U.S.C. §85, the United States Court, in 1873 (*Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409), evolved what became known as "most favored lender" doctrine. This doctrine provides that a national bank doing business in a state where it is not located may charge the highest rate of interest for that type of loan allowed by that state regardless of the type of lender. In other words,

even though the state banks in that state were limited; a national bank could charge a higher rate if an individual person could charge a higher rate. The "most favored lender" doctrine was subsequently embodied in a regulation issued by the Comptroller of Currency in 12 C.F.R. §7.7310.

**"CHARGING INTEREST AT RATES PERMITTED  
COMPETING INSTITUTIONS; CHARGING INTER-  
EST TO CORPORATE BORROWERS.**

(a) A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed.

(b) A national bank located in a State the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower."

Minnesota, by Minnesota Statute 48.185, has set up credit card loans as a separate loan entity and provides that a credit card customer may be charged a \$15.00 annual service charge but shall not be charged a rate of interest in excess of 12% per annum (1% per month). The plaintiff in this case issues BankAmericard credit cards pursuant to a franchise it has with the National BankAmericard Company. However, it charges only a \$10.00 fee as a one year service charge.

Defendants claim that under 12 U.S.C. §85, they are permitted to charge Minnesota residents the interest rate allowed by Nebraska Law, the state where First National Bank of Omaha is located. The Nebraska rate for credit card transactions would be 18% per annum or one and one half percent per month. Defendants propose to issue BankAmericards with no yearly service charge but will be charging a rate of interest higher than allowed by Minnesota Statutes regulating credit card loans.

This Court, on December 22, 1976, issued a Temporary Restraining Order, restraining defendants from soliciting or offering a bank credit card program in the State of Minnesota, in violation of Minnesota Statutes, Section 48.185. An application was made to the Minnesota Supreme Court by defendants and the Supreme Court denied them the relief they requested and ordered them to go back to the District Court for further proceedings. This matter was heard by the Court on January 7, 1977, on stipulated facts. It was further stipulated that this was to be a trial on the merits for a permanent injunction. Defendants rely on a number of arguments, some of which can be disposed of, without great discussion.

First of all, defendants argue that their interest rate is not higher than allowed under Minnesota Statutes because of the allowable \$15.00 annual service charge. It is true that for customers who do not have very high credit card charges the \$15.00 annual fee, when added as additional interest, makes it a higher rate. The interest rate at the low end of the scale would be higher. It is clear that defendants are not interested in small borrowers, however, and they are basically interested in the large users of credit cards and are more concerned with the large borrowers of money under the credits cards, and it is in this area that they would be violating the Minnesota



Statutes. The fact that they would be de facto in compliance at the lower end of the interest scale does not help them if they are in non-compliance at the high end of the interest scale. In fact, the Court's Order of December 22, 1976, has never prohibited defendants from soliciting credit card customers. It merely prohibited them from soliciting credit card customers in violation of Minnesota Statutes 48.185. So, if defendants are not soliciting customers, it's only because they intend to charge an interest rate greater than Minnesota law allows.

Defendants make great argument about the intelligence and education of consumers in our community and how, if they, in fact, charge a higher interest rate, they could not exist in a competitive market. This flies in the face of all known facts. It is common knowledge and well documented that consumers cannot make these judgments and there has been a plethora of consumer protection laws evidencing the fact that the government must protect the consumers from complicated business practices. Minnesota Statutes 48.185 is part of our consumer protection laws and the argument that consumers can protect themselves is an argument of long, long ago.

Since the founding of our republic, Congress, by its legislation, has allowed states to set their own interest rates. By their position in this case, the defendants are arguing that they have a right to export Nebraska's high interest rate into the State of Minnesota. This Court, in its Order of December 22, 1976, said:

"To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must

be to preserve the financial customs of so long a standing in our Republic."

A long standing acquiescence in an interpretation of a law by the community is recognized as a powerful principal of statutory construction. See Sutherland Statutory Construction. §49.06.

"The meaning which persons affected by an act and the public at large ascribe to it may nevertheless have an important bearing on how it should be construed.

'A practical construction given a statute by the public generally, as indicated by a uniform course of conduct over a considerable period of time, and acquiesced in and approved by a public official charged with the duty of enforcing the act, is entitled to great weight in the interpretation which should be given it, in case there is any ambiguity in its meaning serious enough to raise a reasonable doubt in any fair mind.' . . ."

Defendants are claiming by citing *Fisher v. First National Bank of Omaha*, Docket No. 75-1976 (8th Cir. January 28, 1977), and *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), that the two Circuit Courts of Appeals are, in fact, allowing National Banks to export their interest rates into low interest states. A reading of those two cases by this Court does not sustain that contention. It should be pointed out that in both of the Fisher Cases, the Courts were not dealing with a statute setting a credit card rate of interest but were applying small loan rate of interest of consumer loan rate of interest because there was no credit card rate of interest in any of the states involved. Therefore, the Court in neither of the Fisher Cases was faced with a specific "credit card interest" rate, but felt it had the choice of applying other interest rates that it deemed appropriate



to those situations. Because Minnesota has a credit card interest rate this creates a different situation because 12 C.F.R. 7.7310 identifies this as "such class of loans".

In both Fisher Cases and in all cases prior thereto, the courts have unanimously agreed that 12 U.S.C. 85 does not restrict national banks to state banking laws but no court has ever been faced with the proposition that we have here interpreting "such class of loans". Up until now the courts have had the freedom of defining credit card loans any way they wished, because no statute specifically provided for credit card loans. Now defendant argues that in the face of a credit card loan rate, it may still pick any rate it so desires. This, in fact, would negate all state usury laws. In effect, it would mean that national banks located in states with no usury laws could charge unlimited interest in any state of the United States. Such a position would seem to fly in the face of the Federal Regulation 12 C.F.R. 7.7310, which embodied the most favored lender rate where the national bank cannot be restricted to class of lenders, but by Federal Regulation are restricted to "class of loans".

It is agreed that 12 U.S.C. §85 was enacted to prevent states from discriminating against national banks. Therefore, states who create a different interest rate between classes of lenders would not be allowed to restrict national banks from enjoying the highest lending interest rates regardless of what class of lender was involved.

The need for such a division is obvious in that if states permitted high interest rates to certain persons in the state and denied them to national banks, national banks could not compete on equal footing and enjoy the parity that the courts have given them.

However, when the state makes laws limiting interest rates as to types of loans, it means that no one in that state can make that loan; therefore, the national bank is no better off or no worse off, than other people within the state.

This concept is embodied in C.F.R. 7.7310, which allows a state to forbid certain classes of loans. This is obviously fair because no one in the state can make such a loan and there is no discrimination against national banks. The national bank enjoys full parity with all other lenders in the state.

The same concept was approved in *Fisher v. First National Bank of Omaha*, 8th Circuit, January 28, 1977, when that case quotes with approval the language in *Union Missouri Bank of Kansas City v. Danforth*, 394 F.Supp. 774 (W.D. Mo. 1975):

"Missouri has in effect made small loan companies licensed under that Chapter 'favored lenders' in the class of debt encompassed by the Retail Credit Sales Act. Plaintiffs, as national banks, are entitled to parity of interest charges with these lenders, notwithstanding the rates permitted to state chartered banks. To hold otherwise would be contrary to the congressional policy of assuring national banks parity with most favored state lenders and frustrate one of the primary objectives of the National Banking Act — competitive state-federal equality."

Heretofore, all of the decisions dealt with discrimination against classes of lenders. All of the cases cited by plaintiff forbid the same. However, the plain meaning of regulation 7.7310 indicates that states are allowed to discriminate as to classes of loans because everyone in the state is forbidden to make the loan and the principle of parity is not violated. Here, the State of Minnesota has set up a class of loan and designated it as a credit card rate. No one in the state is al-

lowed to issue credit at a more favorable rate; to allow First Bank of Omaha to charge a higher rate would violate the doctrine of parity.

The 8th Circuit Court in *Fisher v. First Bank of Omaha* interpreted *Fisher v. First National Bank of Chicago* to mean that the foreign national bank is limited with respect to the class of loans designation set by the state.

"In the very recent case of *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), it was held that under the provisions of §85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to *the same class of debt*, the bank may charge the higher of the two rates. (Emphasis supplied).

We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for *the same class of loan* regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate. (Emphasis supplied.)

In summary, states may not discriminate between classes of lenders but may discriminate between classes of loans and because Minnesota has set a separate and distinct credit card rate, there is no loss of parity by requiring the defendants to comply with that law.

JUDGE RICHARD J. KANTOROWICZ

STATE OF MINNESOTA  
County of Hennepin

DISTRICT COURT  
Fourth Judicial District

726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

and

WARREN SPANNAUS, ATTORNEY GENERAL,  
STATE OF MINNESOTA,

Plaintiff-Intervenor,

Against

FIRST OF OMAHA SERVICE CORPORATION, and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

# JUDGMENT

February 22, 1977

The above entitled action having been regularly placed upon the calendar of the above named Court for the September 1976 General Term thereof, came on for trial before the Court on the 7th day of January, and the Court, after hearing the evidence adduced at said trial and being fully advised in the premises, did, on the 18th day of February 1977, duly make and file its findings and order for judgment herein.

Now, pursuant to said order and on motion of John Troyer, Esq., Attorney for Plaintiff,

IT IS HEREBY ADJUDGED AND DECREED:

1. That nothing contained in the National Bank Act, 12 U.S.C. §85, precludes or preempts the application and enforcement of Minnesota Statutes, §48.185 to the First National

Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota.

2. That the laws of the State of Minnesota, not the laws of the State of Nebraska, apply in determining the rate of interest permitted to be charged and collected by the First National Bank of Omaha from BankAmericard holders residing in the State of Minnesota.

3. That the First National Bank of Omaha's BankAmericard program, as offered and operated in the State of Minnesota, is in violation of Minnesota Statutes, §48.185, in that it provides for the collection of a periodic rate of finance charge in excess of 1 percent per month.

4. That as agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, Defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha has violated and threatens to continue to violate Minnesota Statutes §48.185.

5. That the Marquette National Bank of Minneapolis, as a bank extending credit in compliance with Minnesota, Statutes, §48.185, which has and will be injured competitively by violations of this statute, is entitled to a permanent injunction prohibiting any continued violating of said statute.

6. That there being no genuine issue as to any material fact, the Court does hereby order that, pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, judgment is hereby

entered in favor of The Marquette National Bank of Minneapolis and against Defendant First of Omaha Service Corporation permanently enjoining Defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

7. That the Court expressly determines under Rule 54.02 of the Minnesota Rules of Civil Procedure that there is no just reason for delay for the entry of said judgment.

By the Court:  
DISTRICT COURT  
ADMINISTRATOR  
By B. ARTHUR  
Deputy

STATE OF MINNESOTA  
County of Hennepin

DISTRICT COURT  
Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION and  
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.



## NOTICE OF APPEAL

To: John Troyer and J. Patrick McDavitt, Attorneys for  
Plaintiff Marquette National Bank of Minneapolis, 520  
Roanoke Building, Minneapolis, MN 55402, 339-0661  
and

Roderick MacKenzie, Special Assistant Attorney General,  
representing the Intervenor State of Minnesota, 500 Metro  
Square Building, St. Paul, MN 55101, 296-6524

PLEASE TAKE NOTICE that the defendant First of  
Omaha Service Corporation appeals to the Supreme Court of  
the State of Minnesota from an order of the District Court  
dated February 18, 1977 and from the judgment entered there-  
on on February 22, 1977, in which the District Court granted  
partial summary judgment against this defendant and perma-  
nently enjoined this defendant from certain activity specified  
therein.

Dated: February 22, 1977.

MACKALL, CROUNSE  
& MOORE

By Clay R. Moore  
1000 First National  
Bank Building  
Minneapolis, Minnesota 55402  
333-1341  
Attorneys for Defendant  
First of Omaha Service  
Corporation

Of Counsel:

William Morrow and  
Donald Buresh  
SWARR, MAY, SMITH  
& ANDERSON  
3535 Harney Street  
Omaha, Nebraska 68131

STATE OF MINNESOTA  
IN SUPREME COURT

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Plaintiff-Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Defendant-Appellant,

and

STATE OF MINNESOTA,

Intervenor-Respondent.

APPELLANT'S MOTION  
FOR STAY

The appellant hereby moves the Court for its order, pursu-  
ant to Rule 108, Rules of Civil Appellate Procedure, as follows:

- 1) Staying the injunction issued by the district court and  
all proceedings thereon in the district court during the  
pendency of this appeal.
- 2) Adjudging that during the pendency of this appeal, the  
appellant First of Omaha Service Corporation may par-  
ticipate in a bank credit card program within the State  
of Minnesota in which finance charges on balances less  
than \$1,000 may be assessed at the rate of 1 1/2% per  
month (18% per annum) and, on balances of \$1,000 or  
more, at the rate of 1% per month (12% per annum).
- 3) Adjudging that during the pendency of this appeal, none  
of the acts of the appellant, or its principal The First  
National Bank of Omaha, or its agents or employees,  
in conformity with (2) above shall, at any time here-

after, be adjudged to be in contempt of the injunction from which this appeal is taken.

- 4) All of the above to be conditioned upon the filing of a supersedeas bond, or a deposit in lieu thereof, in the amount of \$10,000, for the purposes set forth in Rule 108.01 (2), in the event the judgment appealed from herein is affirmed; said deposit to be returned to appellant upon application in the event the injunction appealed from herein is vacated by this Court.

This motion is based upon all of the files and records in this proceeding and upon the affidavit of Clay R. Moore attached.

Dated: February 28, 1977.

**MACKALL, CROUNSE**

**& MOORE**

By Clay R. Moore

1000 First National

Bank Building

Minneapolis, Minnesota 55402

(612) 333-1341

Attorneys for Appellant

First of Omaha Service

Corporation

Of Counsel:

William Morrow and

Donald Buresh

**SWARR, MAY, SMITH**

**& ANDERSON**

3535 Harney Street

Omaha, Nebraska 68131

(402) 341-5421

**STATE OF MINNESOTA  
IN SUPREME COURT**

**THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,**

Plaintiff-Respondent,

vs.

**FIRST OF OMAHA SERVICE CORPORATION,**

Defendant-Appellant,

and

**STATE OF MINNESOTA,**

Intervenor-Respondent.

**AFFIDAVIT OF CLAY R. MOORE**

State of Minnesota

County of Hennepin—ss.

Clay R. Moore, Esq., being duly sworn on oath, deposes and says:

- 1) That he is one of the attorneys of record for the appellant First of Omaha Service Corporation and makes this affidavit in support of the attached Motion for Stay and based upon his personal knowledge of the proceedings in this case.
- 2) That, in affiant's judgment, the Supreme Court has the power, inherently and pursuant to Rule 108, to order and adjudge the relief sought in the attached motion and should do so, particularly in the light of the decision of January 28, 1977, of the U.S. Court of Appeals for the Eighth Circuit in *Fisher v. First National Bank of Omaha*, ——— F.2d ———.
- 3) That the district court, on December 22, 1976, as a condition of issuing the temporary restraining order herein

(later converted on February 18, 1977 to a permanent injunction) ordered the respondent Marquette, as a condition thereof, to post a bond of \$10,000, over the objections of appellant as to its sufficiency.

- 4) If the anticipated damage to the appellant by reason of the temporary restraining order was considered by the district court and respondent to be \$10,000, the bond requested herein to be posted by appellant as a condition of the relief sought herein cannot consistently be ordered to be more than \$10,000.

Dated: February 28, 1977.

Clay R. Moore

Sworn and subscribed to before me this 28th day of February, 1977. — Mary A. McMillen, Notary Public, Hennepin County, Minnesota. My commission expires Sept. 16, 1983.

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STATE OF MINNESOTA  
IN SUPREME COURT

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No. 47561

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THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Plaintiff-Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Defendant-Appellant,

and

STATE OF MINNESOTA,

Intervenor-Respondent.

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RESPONSE IN OPPOSITION TO  
APPELLANT'S MOTION FOR STAY

Respondent makes the following response in opposition to appellant's motion to this Court for a stay of the permanent injunction entered in the District Court. Appellant's motion is inappropriate both procedurally and substantively.

Procedurally, a motion for stay pending appeal of a final judgment granting an injunction is one that should properly be made to the *District Court* under Rule 62.02 of the Minnesota Rules of Civil Procedure ("MRCP"):

"When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Under the above rule, the District Court is given the discretion to decide whether or not to suspend a permanent injunction pending appeal by the enjoined party. The reason for the rule is that the trial court is considered to be in a better position, having heard the parties' respective positions at the trial court level as to the nature and extent of the controversy, to determine if such a stay is appropriate. *See, Hetland and Adamson, Minnesota Practice*, Rule 62.02, at p. 83.

Appellant has not addressed its motion for stay to the District Court, but rather, has attempted to use Rule 108 of the Minnesota Rules of Civil Appellate Procedure ("MRAP") for this purpose. This Court has held that MRCP Rule 62.02 controls over MRAP Rule 108 (formerly M.S.A. §605.11) and that the proper procedure in considering a stay of an injunction pending appeal is to bring such a motion before the District



Court in the first instance, subject to review by the Supreme Court when appropriate. *State, by Clark v. Robnan, Inc.*, 259 Minn. 88, 107 N.W. 2d 51 (1960). In addition, even if MRAP Rule 108 did control the appropriate procedure for requesting a stay of permanent injunction pending appeal, appellant has also ignored the provisions of Rule 108.01(1) requiring approval of the amount and form of supersedeas bond by the District Court.

Substantively, appellant's motion is also without merit. The District Court has entered its final order permanently enjoining defendant from engaging in any solicitation of Minnesota residents or other activity in connection with the offering or operation of a bank credit card program in this State in violation of Minnesota Statutes, §48.185. Having determined that said contemplated bank credit card program would be illegal in Minnesota if permitted to operate with an interest rate of 18 percent per annum, it would be incongruous for the Court to now permit appellant to proceed and violate Minnesota law pending the disposition of the appeal.

It is not unlike the situation present in the *Robnan* case cited above. There the trial court granted a temporary injunction restraining the defendant vendor from selling, offering for sale, or advertising any merchandise at less than cost in violation of Minnesota Statutes, §325.04. The defendant-appellant in that case, as here, claimed the state statute was invalid and sought to have the injunction stayed pending appeal to the Supreme Court on the issue of the Statute's validity. The trial court refused such a stay and the Supreme Court similarly denied appellant's motion for stay declining to interfere with the discretion exercised by the District Court. *State, by Clerk v. Robnan, Inc., supra*, 259 Minn. at 90.

Appellant implies that a recent federal court opinion (*Fisher v. First National Bank of Omaha*, — F. 2d —) discussing Iowa law has ruled on the issues presented here and, for that reason, a stay should be granted. That decision was, however, fully discussed by the District Court in its Memorandum accompanying its order for permanent injunction and found to be entirely inapplicable to the instant case. In any event, the issues presented here being one of the first impression in Minnesota, the District Court's decision stands unrefuted as stating the applicable law in this State and fully supports the continuation of the permanent injunction during the appeal period.

Finally, the appellant's motion for stay should be denied for the reason that it would bring about one of the very results that the District Court's injunction was designed to prevent, i.e. irreparable injury to the plaintiff-respondent by reason of defendant's violation of state law. The District Court specifically found that, to permit defendant to operate a bank credit card program at 18 percent per annum in violation of Minnesota Statutes, §48.185 would "result in competitive injury to The Marquette National Bank of Minneapolis and its BankAmericard program." See, District Court's *Findings of Fact*, Paragraph XII. A stay of the District Court's order would, in effect, permit appellant to engage in said illegal conduct during the pendency of the appeal to the irreparable detriment and injury of respondent.\*

\*There has been no such showing of irreparable harm to appellant if a stay is not granted. Indeed, as noted in the Response to Appellant's Motion for Expedited Appeal, appellant is in no way restrained from marketing its BankAmericard program in Minnesota as long as it does so in accordance with the interest rates permitted by Minnesota law.

Accordingly, respondent respectfully requests that appellant's motion for stay be denied.

Dated: March 1, 1977.

LEVITT, PALMER, BOWEN,  
BEARMON & POTMAN

By John Troyer

J. Patrick McDavitt

Attorneys for Plaintiff-

Respondent The Marquette

National Bank of

Minneapolis

500 Roanoke Building

Minneapolis, Minnesota 55402

Telephone: 339-0661

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STATE OF MINNESOTA  
IN SUPREME COURT

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THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Plaintiff-Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Defendant-Appellant,

vs.

THE STATE OF MINNESOTA, BY  
WARREN SPANNAUS, ITS ATTORNEY GENERAL,

Intervenor-Respondent.

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RESPONDENT ATTORNEY GENERAL'S ANSWER  
IN OPPOSITION TO APPELLANT'S  
MOTION FOR STAY

The State of Minnesota, by its Attorney General, intervenor-respondent in this action, submits the following as its Answer In Opposition To Appellant's Motion For Stay.

Through its Motion For Stay, appellant is asking this Court to stay an injunction issued by the Hennepin County District Court enjoining appellant from offering its BankAmericard program in Minnesota at 18 percent per annum interest rates, rates which are clearly in violation of the express terms of Minn. Laws 1976, ch. 196, §5, upon the one condition that appellant file a supersedeas bond in the amount of \$10,000 pursuant to Minn. R. Civ. App. P. 108.01(2).

The District Court heard extensive argument on the question of whether an injunction should issue in this case. The court found not only that appellant's interest rates are illegal under Minn. Laws 1976, ch. 196, §5, subd. 3, but also that appellant's BankAmericard program in Minnesota has caused respondent Marquette National Bank competitive injury. Given these findings, the court was clearly within its discretion in enjoining appellant under Minn. Laws 1976, §5, subd. 7 since that statute provides in part as follows:

Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required.

By granting a stay of this injunction now, the Supreme Court would essentially be reversing this determination on the merits made by the District Court. Such a result would not be in accord with the much more limited purpose of rule 108 which is to protect the rights of all parties during an appeal. A stay

here would drastically change the relative positions and rights of the parties during the appeal since it would permit appellant to engage in activity specifically denied it by the District Court. Such a radical change in the rights of the parties is not contemplated by rule 108.

Moreover, because of the nature of the State of Minnesota's interest herein, appellant simply cannot comply with rule 108.01(2). That rule provides as follows:

If the appeal is from an order, the condition of the [supersedeas] bond shall be the payment of the costs of the appeal, the damages sustained by the respondent in consequence of the appeal, and the obedience and satisfaction of the order or judgment which the Supreme Court may give, if the appeal is dismissed.

There is absolutely no way in which the damages which would be sustained by the State as a result of a grant of a stay could be determined since the State's interest in preventing patent violations of its statutes cannot be measured, and since a continuing violation of Minn. Laws 1976, ch. 196, §5 will cause the State irreparable injury. A supersedeas bond cannot protect against this kind of injury. Thus, appellant cannot meet the requirements of rule 108(2) and should not be granted a stay thereunder.

For the foregoing reasons, the State of Minnesota, by its Attorney General respectfully requests that appellant's Motion For Stay be denied.

Dated: March 8, 1977.

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STATE OF MINNESOTA  
IN SUPREME COURT

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No. 47561

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THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Plaintiff-Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Defendant-Appellant.

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ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that appellant's motion to stay all proceedings pending appeal be, and the same is, hereby denied; and

IT IS FURTHER ORDERED that the appeal be expedited and the matter be set for en banc hearing on April 6, 1977, at



9:30 A. M. Appellant's brief shall be served and filed within 3 days from the filing date of this order; respondent's brief shall be served and filed within 10 days thereafter and appellant shall have an additional 2 days to file its reply brief.

Dated: 3-18-77.

By the Court:  
ROBERT J. SHERAN  
Chief Justice

No. 250

Hennepin County

File No. 47561

Todd, J. Concurring specially, Sheran, C. J. Dissenting,  
Scott, J., Yetka, J., Wahl, J.

Endorsed  
Filed November 10, 1977  
John McCarthy, Clerk  
Minnesota Supreme Court

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA,

Intervenor,

Respondent.

#### SYLLABUS

A national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in

the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Reversed.

Considered and decided by the court en banc.

#### OPINION

TODD, Justice.

The Marquette National Bank of Minneapolis (Marquette) sought to enjoin the First National Bank of Omaha (Omaha Bank) and its wholly-owned subsidiary, First of Omaha Service Corporation (Omaha Service) from issuing BankAmericard credit cards to the State of Minnesota. The Omaha Bank program assessed customers an annual interest rate of 18 percent on unpaid balances of less than \$1,000, to be computed upon the prior month's balance of the individual account. The Minnesota Credit Card Act (Minn. St. 48.185)<sup>1</sup> sets a maximum interest rate of 12 percent per annum with the interest charge to be based on an amount no greater than the average balance of the individual account for the prior

<sup>1</sup> Minn. St. 48.185 provides in pertinent part: "Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

"Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

"(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank."

month. As a result of procedural actions, Omaha Service remains as the only defendant, but the matter was considered as though the Omaha Bank still remained as a defendant. The district court entered judgment permanently enjoining Omaha Service from soliciting BankAmericard customers on behalf of the Omaha Bank in Minnesota in contravention of the provisions of Minn. St. 48.185. We reverse.

Prior to the hearing on the matter, the parties agreed to a stipulation of facts which provides:

"I.

"The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue \* \* \* BankAmericard credit cards to Minnesota residents who qualify for them.

"II

"Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

"III

"Defendant First of Omaha Service Corporation will participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. \* \* \* While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

"IV

"The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. \* \* \*

"V

"Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank,

respectively. The sales draft forms are then deposited by the participating Minnesota merchant to his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

#### "VI

"The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1-1/2% per month on the first \$999.99 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of \$1,000 and more for an annual percentage rate of 12%. \* \* \* [T]he finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

#### "VII

"The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly

receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

#### "VIII

"The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. § 85.

#### "IX

"The plaintiff The Marquette National Bank of Minneapolis ('Marquette') is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solici-



tation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

"X

"Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. \* \* \*

"XI

"Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition a finance charge equal to 1% per month (12% annual percentage rate). \* \* \* [T]he finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the amount is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance."

The procedural history of this case is significant. Marquette originally commenced an action in Minnesota district court against the Omaha Bank, Omaha Service and the Credit Bureau of St. Paul, Inc., alleging violations of the Minnesota

Credit Card Act (Minn. St. 48.185), and the Minnesota Deceptive Trade Practices Act (Minn. St. 325.772); and seeking money damages and injunctive relief to restrain the defendant from solicitation in Minnesota for defendant's BankAmericard program. Since the Omaha Bank was a national bank, the case was removed to the United States District Court for Minnesota pursuant to 28 USCA, § 1441. Marquette thereafter dismissed Omaha Bank as a party defendant, resulting in the case being remanded back to the state district court because of a lack of Federal subject matter jurisdiction.<sup>2</sup> The case then proceeded solely against Omaha Service. However, because Omaha Service's function is limited to entering into agreements with merchants and local banks, and, since it does not have control over the issuance of credit cards or establishing the rate of finance charge, the case was treated as if the Omaha Bank was still the defendant.

The district court issued a permanent injunction against Omaha Service prohibiting the "solicitation of residents of the State of Minnesota or other activity in connection with \* \* \* the operation of a bank credit card program" which violates Minn. St. 48.185. In issuing the permanent injunction, the court held that while Federal law prevents states from enacting laws which discriminate against classes of lenders, it does not preclude states from discriminating against classes of loans. The principal issue presented on appeal is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state.

<sup>2</sup> If Marquette had not dismissed the Omaha Bank as a party defendant, the case would have undoubtedly been transferred to the United States District Court for Nebraska since a national bank can only be sued in the forum where it is established. See, *Radz-anower v. Touche Ross & Co.* 426 U. S. 148, 96 S. Ct. 1989, 48 L. ed. 2d 540 (1976).

National banks are regulated by the United States Congress. The amount of interest which a national bank may charge its customers is governed by 12 USCA, § 85, which provides in part:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, *interest at the rate allowed by the laws of the State, Territory, or District where the bank is located.* \* \* \*." (Italics supplied.)

The application of this section to interstate credit transactions has been recently considered by both the Seventh and Eighth Circuit Courts of Appeals. In *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977), the court addressed a situation in which a national banking association with its principal place of business in Illinois was charging Fisher, an Iowa resident, interest on the unpaid balance of his monthly BankAmericard statement at a rate allowable in Illinois. Fisher brought an action alleging that the Illinois bank was charging usurious interest to Iowa residents under its BankAmericard program. In permitting the Illinois bank to assess Illinois interest rates to Iowa resident users of the credit card, the court of appeals stated (538 F. 2d 1289):

"\* \* \* The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois. If we could stop there and only look at the first portion of § 85, we could easily conclude that the 18% per annum rate of interest allowed by the Illinois Revolving Credit Act, Ill. Rev. Stat., ch. 74, § 4.2 (1973), governs the rate chargeable by the defendant within Illi-

nois and anywhere else that it might do business. The language is certainly broad enough to bear that interpretation. It refers to the interest on 'any loan or discount made' as being governed by the laws of the single state where the national bank can be located.

"\* \* \* The crux of this case is what law governs when the Chicago-located national banking association does business in another state, here Iowa. \* \* \*

\* \* \* \* \*

"We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to all loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa."<sup>3</sup>

<sup>3</sup> But see, *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62, 73 (E. D. La. 1969), in which the court reasoned: "In effect, 12 U.S.C. § 85 provides that a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. The question is whether this was meant to fix the rate of interest on all loans made by the bank or merely those loans made in that state. Admittedly, the above quoted language would seem to include all loans made by the bank and not solely those made in the state where the bank is located. \* \* \*

\* \* \* \* \*

"We hold that 12 U.S.C. § 85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state."

This reasoning was disapproved by the Seventh Circuit in *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284, 1290 (7 Cir. 1976) certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977): "We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."

After the action against the Illinois bank was in progress, the same plaintiff brought an almost identical action against the First National Bank of Omaha, challenging its right to charge Iowa resident customers of the Omaha BankAmericard program interest rates allowable in Nebraska. In *Fisher v. First National Bank of Omaha*, 548 F. 2d 255, 257 (8 Cir. 1977), the court of appeals, in denying the plaintiff's claim, stated:

"\* \* \* The question is whether under the National Bank Act we are required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa but consummated in Nebraska.\* \* \*

"\* \* \* We are persuaded, however, that it really makes no difference whether the transactions are characterized as being Nebraska transactions or whether they are characterized as Iowa transactions.

"In the very recent case of *Fisher v. First Nat'l Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

"We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If

Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit. By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system.

In reaching a decision to enjoin Omaha Service and, in practical effect, the Omaha Bank from operating their BankAmericard program in Minnesota in violation of § 48.185, the district court sought to distinguish the two Fisher cases. In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 USCA, § 85, precludes states from discriminating against lenders as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.



The particular section of the National Bank Act under consideration in this case has been in existence for over a century. Obviously, the ramifications and problems resulting from bank credit card financing could not have been considered by Congress at the time of its adoption. Furthermore, a rather strong argument can be made that credit card financing is not purely banking business even though a bank may administer the program. The original version of the National Bank Act was enacted by Congress to protect national banks from discriminatory economic legislation by individual states in which the various national banks were located. The result of the Federal legislative efforts was to create what has commonly been referred to as a "most favored lender status" for national banks. *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 879 (8 Cir. 1975); *United Missouri Bank of Kansas v. Danforth*, 394 F. Supp. 774, 779 (W. D. Mo. 1975). In the landmark case of *Tiffany v. National Bank of Missouri*, 85 U. S. (18 Wall.) 409, 21 L. ed. 862 (1874), the laws of Missouri limited the amount of interest chargeable by banks organized under state laws to 8 percent but allowed all other persons in the state to assess a 10-percent interest charge upon credit transactions. Within this statutory scheme a national banking association organized and located in the State of Missouri charged its credit customers a 9-percent interest rate which was alleged to be usurious. In an early interpretation of virtually identical statutory language to that employed in 12 USCA, § 85, the Supreme Court held that the National Bank of Missouri could lawfully charge its customers a 10-percent interest rate and reasoned (85 U. S. [18 Wall.] 412, 21 L. ed. 683):

"\* \* \* Coupled with the general spirit of the act, and of all the legislation respecting National banks, it is controlling. It cannot be doubted, in view of the purpose of

Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government.

It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."

The decisions reached in the Fisher cases injected a new attribute into the "most favored lender status," which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Bank Act.

However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court's order which enjoins Omaha Service from operating the Omaha Bank's BankAmericard program by charging an interest rate in violation of § 48.185. Consistent with the reasoning in the Fisher cases, the Omaha Bank may assess an interest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb. Rev. Stat. § 8-820.

Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created. A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to

allowable interest rates. The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.

Reversed.

SHERAN, Chief Justice (concurring specially).

I agree with the result. I do not agree that the public suffers by application of the law in this case where users of credit cards now have a choice between competing suppliers.

SCOTT, Justice (dissenting).

I respectfully dissent. The original purpose of 12 USCA, § 85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was intended to put "national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders." *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 880 (8 Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The Fisher decisions and the majority of this court interpret § 85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota but rights greater than the most

favorable lender. Surely this result is not within the contemplation of the National Bank Act.

As the majority opinion states, "The decisions reached in the Fisher cases injected a new attribute into the 'most favored lender status,' which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs." Additionally, should a simple credit card transaction between a local citizen and a local merchant be construed as a bank loan by the Nebraska bank to a Minnesota citizen as Fisher proclaims without question? Minnesota should reject such an extension as a misinterpretation of the National Bank Act<sup>1</sup> and exercise its own judgment. In such matters we are not bound by the Federal circuit court cases but only by holdings of the United States Supreme Court.<sup>2</sup> E.g., *United States ex rel. Lawrence v. Woods*, 432 F. 2d 1072, 1076 (7 Cir. 1970).

I would therefore affirm the trial court's issuance of the permanent injunction against Omaha Service prohibiting the solicitation of credit card customers in Minnesota as a violation of Minn. St. 48-185.

YETKA, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

WAHL, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

<sup>1</sup> The trial court, in its order of December 22, 1976, stated: "To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and make a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

<sup>2</sup> "While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely the Supreme Court." 1B Moore, *Federal Practice*, Par. 0.402[1], p. 65 (2 ed.).

STATE OF MINNESOTA  
OFFICE OF CLERK OF SUPREME COURT  
ST. PAUL, MINN.

File No. 45761

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA,

Intervenor,

Respondent.

November 21, 1977

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs are stayed pending its determination.

Yours respectfully,

JOHN McCARTHY,

Clerk, Supreme Court



STATE OF MINNESOTA  
IN SUPREME COURT

NO. 47561

THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, INTERVENOR,

Respondent.

PETITION OF RESPONDENT FOR REHEARING

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Corporation

To The Honorable Justices of The Minnesota Supreme Court:

Respondent, The Marquette National Bank of Minneapolis ("Marquette"), respectfully petitions this Court for a rehearing en banc of its decision of November 10, 1977, in the above-entitled case.

In the majority opinion construing Minnesota Statutes, §48.185, et seq., in light of 12 U.S.C. §85, the Court held that a national bank may charge its non-resident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Respondent files this Petition for Rehearing on the following bases: (1) the exercise by Marquette of its procedural right on June 14, 1976 to dismiss its cause of action against the First National Bank of Omaha ("Omaha Bank") in order to avoid federal removal jurisdiction and the transfer by the United States District Court for Minnesota to the United States District Court for Nebraska was not done to avoid the decision of the United States Court of Appeals for the Eighth

Circuit in the case of *Fisher v. First National Bank of Omaha*, 548 F.2d 255, which was decided on January 28, 1977, (2) the majority has misread *Fisher v. First National Bank of Omaha*, *supra*, in that the adoption by the Eighth Circuit of the Seventh Circuit's construction of 12 U.S.C. §85 in *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Circuit, 1976), is not central to the Eighth Circuit's holding and the Minnesota Supreme Court in construing 12 U.S.C. §85 is in effect writing on a "clean slate", and (3) if the decision of the majority of the Minnesota Supreme Court is permitted to stand, local Minnesota banks in conducting credit card programs in this state will be driven from the market place by out-of-state national bank competitors and once this happens, such out-of-state national banks will be free to raise their interest rates and Minnesota consumers will suffer as a result.

# I

RESPONDENT IN DISMISSING ITS CLAIMS AGAINST THE FIRST NATIONAL BANK OF OMAHA IN ORDER TO AVOID FEDERAL REMOVAL JURISDICTION AND TRANSFER OF THIS MATTER TO THE FEDERAL DISTRICT COURT IN NEBRASKA EXERCISED ITS PROCEDURAL RIGHTS WITHOUT INTENT TO AVOID THE EIGHTH CIRCUIT'S DECISION IN FISHER V. FIRST NATIONAL BANK OF OMAHA, WHICH WAS HANDED DOWN ON JANUARY 28, 1977, MORE THAN SEVEN MONTHS LATER.

The majority of the Minnesota Supreme Court in rendering its decision relied heavily on the fact that Marquette dismissed its claims against the Omaha Bank in the above-entitled matter in order to avoid removal of the case to the United States District Court for Minnesota pursuant to 28 U.S.C. § 1441 and transfer of the case to the United States Dis-

trict Court for the District of Nebraska pursuant to 12 U.S.C. §94. The majority suggests that if Marquette had not dismissed the Omaha Bank as a party defendant, federal removal jurisdiction would have been obtained and the case would have been transferred to the United States District Court for the District of Nebraska, since a national bank can only be sued in the forum where it is established under 12 U.S.C. §94.

Judge Alsop in determining the removal question (422 F. Supp. 1346) found that Marquette was asserting a claim under state law, to-wit, Minnesota Statutes, §48.185, and that the Omaha Bank's defense that 12 U.S.C. §85 preempted state law did not convert Marquette's state law claim into a claim under federal statutes raising a federal law question and that, therefore, the U.S. District Court had no removal jurisdiction. Judge Alsop made it quite clear in his opinion that in considering federal removal jurisdiction, he considered the matter as if the Omaha Bank was still a party to the subject proceedings. Hence, Marquette's dismissal of its claims against the Omaha Bank on June 14, 1976, had no effect on Judge Alsop's decision on November 18, 1976, to remand the matter to Hennepin County District Court, State of Minnesota.

At the time Judge Alsop rendered his decision finding no federal removal jurisdiction and remanding the matter to the Minnesota State Court, the Eighth Circuit had not rendered its decision in *Fisher v. First National Bank of Omaha*, *supra*. This decision came down on January 28, 1977, after the Hennepin County District Court had issued its temporary restraining order (December 22, 1976); after the Minnesota Supreme Court had denied the Omaha Service Corporation's application for a writ of prohibition (December 31, 1976), and after a hearing on respondent's motion for a temporary and permanent injunction (January 7, 1977). On February 18, 1977, the

Hennepin County District Court, State of Minnesota, issued its permanent injunction enjoining First of Omaha Service Corporation from engaging in any bank credit card transactions in the State of Minnesota without first conforming its rate structure to Minnesota Statutes, §48.185. Thus, Judge Kantorowicz in issuing a permanent injunction had the benefit (or burden) of the Eighth Circuit's reasoning in that case.

To summarize, the following is a chronological list of the procedural history of the instant case leading up to the permanent injunction entered by the Hennepin County District Court:

May 14, 1976	Suit commenced.
June 10, 1976	Omaha Bank's Motion to Dismiss claiming proper venue was Douglas County, Nebraska.
June 11, 1976	Defendants' removal of case to Federal Court.
June 14, 1976	<i>Plaintiff's dismissal of Omaha Bank.</i>
June 18, 1976	<i>Plaintiff's Motion for Remand to State Court.</i>
November 18, 1976	Judge Alsop's Order Remanding case to State Court.
December 22, 1976	Temporary Restraining Order issued by Judge Kantorowicz.
December 31, 1976	Minnesota Supreme Court's Order Denying Defendant's Petition for Writ of Prohibition.

January 4, 1977	Plaintiff's Motion for Partial Summary Judgment or Temporary Injunction.
January 28, 1977	<i>Eighth Circuit's decision in Fisher.</i>
February 18, 1977	Permanent Injunction issued by Judge Kantorowicz.

In view of the foregoing, Marquette's motives in opposing removal of the action to the U.S. District Court for the State of Minnesota and transfer to the U.S. District Court for Nebraska, had nothing to do with the Eighth Circuit's decision in *Fisher v. First National Bank of Omaha, supra*. Since Marquette was asserting for the first time a state law claim under Minnesota Statutes, §48.185, it was preferred that a Minnesota court, rather than a Nebraska court, be given the first opportunity to construe such statute. Marquette preferred to get on with the merits of the litigation rather than have its cause of action bog down over a procedural hassle as to whether the courts in Minnesota or Nebraska had venue jurisdiction over the Omaha Bank under 12 U.S.C. §94 and, therefore, dismissed its claims against the Omaha Bank in order to avoid such procedural hassle.

The majority cites *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 96 Supreme Court, 1989, 48 L.Ed.2d. 540 (1976), for the proposition that a Federal District Court sitting in Minnesota (or a state court, for that matter) would have transferred the case to the Federal District Court for Nebraska (or dismissed the action) under 12 U.S.C. §94, if respondent Marquette had not dismissed its claims against the Omaha Bank. However, there was no absolute certainty that transfer (or dismissal by a state court) would have occurred. The United States Supreme Court in *Radzanower v. Touche, Ross & Co.*,



*supra*, points out that a national bank, by its activities in a state other than the state where it is located, can waive its venue privilege under 12 U.S.C. §94. Because of respondent's election to dismiss its claims against the Omaha Bank, the question of venue jurisdiction over the Omaha Bank was never reached. However, it seems clear that the Omaha Bank as a result of its solicitation of Minnesota residents to enroll in the Omaha Bank's bank credit card program may well have waived its venue privilege and subjected itself to suit in the Federal District Court for the State of Minnesota or the Minnesota state courts. See *Citizens & Southern National Bank v. Bougas*, — U.S. — (Nov. 8, 1977), appended hereto; *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa.Super. 185, 240 A.2d 90 (1968), cert. denied 393 U.S. 952 (1968).

Moreover, even if the Eighth Circuit decision in *Fisher v. First National Bank of Omaha*, *supra*, had been in force and effect at the time Marquette first commenced this litigation, Marquette could have avoided the so-called "predetermined results" by suing the Omaha Bank in the Nebraska state courts. Marquette elected not to sue there because of the Minnesota state law question involved in this case. However, as Justice Scott points out, state courts are not bound by Federal Circuit Court cases but only by holdings of the United States Supreme Court and it is possible that a Nebraska state court judge, exercising independent judgment, would have distinguished the Fisher cases and ruled in favor of Marquette.

In view of the foregoing, the procedural history of this case is insignificant. Marquette in dismissing its claims against the Omaha Bank in no way sought to avoid a result that was otherwise "predetermined". It is respectfully submitted, therefore, that the Minnesota Supreme Court should not decide this case on the basis that because of the procedural history of the

case, it must necessarily defer to the Eighth Circuit's opinion rather than exercising independent judgment in this matter.

## II.

THE EIGHTH CIRCUIT'S CITATION OF THE SEVENTH CIRCUIT'S OPINION IN *FISHER V. FIRST NATIONAL BANK OF CHICAGO* WAS NOT CRITICAL TO THE EIGHTH CIRCUIT'S DECISION.

Justices Yetka and Wahl joined with Justice Scott, who dissented, stating:

"The Fisher decisions and the majority of this Court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act."

As Justice Scott points out in his dissenting opinion, state courts are not bound by federal circuit court cases but only by holdings of the United States Supreme Court and urges the majority to exercise independent judgment in the matter, rather than deferring to the Fisher decisions in the Eighth and Seventh Circuits because of use by Marquette of procedural devices to maintain the action in the Minnesota courts.

In *Fisher v. First National Bank of Chicago*, *supra*, the Seventh Circuit affirmed the United States District Court for

the Northern District of Illinois, Eastern Division, which held:

"Although §85 is silent as to the permissible rate of interest on loans made to borrowers situated in states other than where the national bank is located, this court feels that under such situations the permissible rate would be defined by the laws of the state in which the borrower is situated. However, a national bank making such a loan would retain its 'most favored lender' status within the parameters of that state's laws." (Document R-5, Respondent's Appendix).

The lower court had concluded that the Chicago bank could operate its bank credit card program in the State of Iowa under Iowa's Small Loan Act (as a most favored lender) and that under the Iowa Small Loan Act, it was permissible to charge a rate of 1-1/2% or 18% per annum.

The Court of Appeals for the Seventh Circuit in *Fisher v. First National Bank of Chicago*, *supra.*, agreed with the lower court's conclusion that a national bank operating outside the state of its charter or location has "favored lender status" and can charge in such state or states the highest rates permitted general lenders or special classes of lenders, such as small loan companies, so long as the bank making the loans confines itself in charging small loan interest rates to the making of small loans or similar kinds of loans.

In affirming the District Court's decision, the Seventh Circuit inexplicably chose not to apply, as the lower court did, a standard choice of law rule, i.e., determining the permissible interest rate as that defined by the laws of the state in which the borrower is situated, in the absence of any agreement between the parties. Restatement of Conflicts of Law, 2d, §188. While concurring in the result reached by the lower court, the

Seventh Circuit unnecessarily elected to construe 12 U.S.C. §85 as containing within itself a built-in "conflicts of law" provision and held that the language of 12 U.S.C. §85 permits a national bank to charge the highest rate of interest which it may charge in its home state or in the state where it is engaged in business, whichever is higher. The effect of such an interpretation is, of course, that a national bank in engaging in business in a state other than its home state may import from its home state (on a strained "most favored lender" theory) the highest rate of interest permitted to banks in the home state and apply that rate in making similar classes of loans in any foreign state. In over 100 years of scrutiny by bank counsel and the judiciary, this is the first time that such construction has ever been urged or given to that statute (at least from the standpoint of reported cases). The Seventh Circuit's finding that 12 U.S.C. §85 has built within it a "conflicts of law" provision must be deemed erroneous, given the legislative history of the statute. Moreover, it is highly unlikely that the Seventh Circuit fully understood the ramifications of such a holding, in that Fisher's counsel represented a class of individual consumers who claimed that the Illinois bank was engaging in usurious practices in Iowa, rather than banks, and was not particularly interested in making arguments seeking to protect the delicate balance of our dual (federal and state) banking system.

The lower court in the second Fisher case, *Fisher v. First National Bank of Omaha*, *supra.*, decided the usury question which Fisher raised in that case in favor of the Omaha Bank. The lower court reasoned that the parties had *agreed* that Nebraska law would apply to the transaction, the bank sales draft evidencing the cardholder's credit transaction was paid in Nebraska by the Omaha Bank, and remittance of payment



for the credit card account was made by the resident to the Omaha Bank in Nebraska. As a result of these contacts, the Nebraska Federal District Court Judge also applied standard "choice of law" rules and held that the Omaha Bank was entitled to charge in its bank credit card program in Iowa the highest rate permitted under Nebraska law on the theory that the credit card transactions initiated in Iowa were "consummated" in Nebraska.

On appeal, the Eighth Circuit Court of Appeals in *Fisher v. First National Bank of Omaha, supra.*, stated that it did not necessarily disagree with the lower court in finding that the bank credit card transactions were "consummated" in Nebraska. In its decision, the Eighth Circuit first compared the Nebraska and Iowa Small Loan Statutes and found that they had comparable rates. The Eighth Circuit then chose to rely upon the view of the Seventh Circuit that a national bank can charge its credit card customers an interest rate allowable in the state where it is located (chartered), or the interest rate of the state where it is doing business, whichever is higher, applied the "most favored lender" rule, and held as a consequence that the Nebraska Bank can charge in Iowa the small loan rates permitted in Nebraska or Iowa.

It is clear that the Eighth Circuit relied upon the similarity of the Small Loan Acts of the States of Nebraska and Iowa in its holding for the Eighth Circuit states:

"\* \* \* (It) is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

It was *not* necessary for the Eighth Circuit to construe 12 U.S.C. §85 in reaching the result that it did in *Fisher v. First National Bank of Omaha, supra.* Standard "conflicts of law" rules provide that in the absence of choice of law by the parties or strong state policy as expressed in a state statute, the courts will normally uphold a credit transaction against the claim of usury, if the interest rate charged is permitted by the laws of the state of the lender or the borrower, whichever is higher. See Restatement of Conflicts of Law, 2d, §188. The Eighth Circuit to obtain the result which it reached had available to it the grounds that the parties, after all, agreed that Nebraska law would apply and that secondly, there was no express statute in Iowa dictating a choice of law rule for lenders who enter the state for the purpose of making loans to Iowa residents. It was entirely unnecessary for the Eighth Circuit, as it was unnecessary for the Seventh Circuit, to construe 12 U.S.C. §85 to reach the result which it did.

The Minnesota State Legislature in Minnesota Statutes, §48.185, Subd. 6 and 7, has expressed state policy by building into those statutory sections a provision that out-of-state lenders continuously and systematically soliciting Minnesota residents for the purposes of enrolling such residents in a bank credit card program, signing up Minnesota merchants and banks to honor the lender's credit cards and receiving remittances of payment from Minnesota residents, must conform their bank credit card rate structure to that dictated by Minnesota Statutes, §48.185. This choice of law rule in Minnesota Statutes, §48.185 is indeed the basis for a crucial distinction between the issues raised in this litigation and the issues raised in the Seventh and Eighth Circuit Fisher cases. In the Fisher cases, the Circuit Courts were not compelled to construe 12 U.S.C. §85 but could have reached the results which they did



solely on standard conflicts of law rules. The standard conflicts of law rule is that the parties to the transaction may first agree as to which state law is to be applied where the lender and the borrower are from separate states. In the absence of such agreement on in the absence of *compelling state interest to the contrary* (as expressed in the forum state's interest rate statutes), the tendency of courts is to uphold the credit transaction against the claim of usury if the interest rate charged complies with the laws of the state of the lender or the borrower. In the Fisher cases, neither Iowa, Nebraska nor Illinois had state laws reflecting a compelling state interest in the choice of law to be applied. Minnesota Statutes, §48.185, leaves no doubt in that respect. Therefore, 12 U.S.C. §85 must be construed and harmonized in light of Minnesota Statutes, §48.185.

Based on the foregoing, the Minnesota Supreme Court is writing on a "clean slate" and should exercise independent judgment in this matter, rather than relying on the Eighth Circuit and Seventh Circuit Court of Appeals decisions which are not only more limited in scope but fraught with *obiter dictum*. It is the solemn burden of the judiciary to harmonize, rather than find conflict between, federal and state law. It certainly is the province of the courts of this state to provide, at the very least, some independent judgment for their holding. The opinion of Judge Kantorowicz has given the Minnesota Supreme Court a basis for distinguishing the Fisher cases. The construction the appellant has given 12 U.S.C. §85, and adopted by the majority opinion herein, is dictated neither by reason, logic, legislative history, or the holdings of the Eighth and Seventh Circuits.

### III

IF THE MAJORITY DECISION OF THE MINNESOTA SUPREME COURT IS PERMITTED TO STAND, LOCAL STATE AND NATIONAL BANKS IN THE STATE OF MINNESOTA WILL BE FORCED TO WITHDRAW THEIR BANK CREDIT CARD PROGRAMS LEAVING THE FIELD TO PREDATORY OUT-OF-STATE NATIONAL BANKS WHO WILL THEN BE FREE TO CHARGE EXORBITANT RATES OF INTEREST TO MINNESOTA CONSUMERS.

The Minnesota Supreme Court by construing 12 U.S.C. §85 to permit a national bank to charge the highest rate of interest permitted in the state where it is located or in the state where it is engaged in business, whichever is higher, has "twisted the plain meaning" of 12 U.S.C. §85 and has given out-of-state national banks a way of driving local state and national banks from the bank credit card field in the State of Minnesota.

Minnesota banks are compelled to impose a membership fee of \$10 or \$15 as well as a 12% interest rate, under Minnesota law, in order to make their bank credit card programs in this state profitable. Given the ruling of the Minnesota Supreme Court, out-of-state national banks located in states which permit higher interest rates (or have no interest rate limitations whatsoever) are now able to operate in the State of Minnesota by offering the bank credit card free and imposing an interest rate of 18% per annum or higher. It is a foregone conclusion that the bank credit card customer prefers not to pay a membership fee for his credit card, whatever the interest rate may be. However, the decision of the Minnesota Supreme Court will permit out-of-state national banks, as a predatory practice designed to force local bank competitors from the field,

to come into the State of Minnesota and for a limited time (long enough to drive out competitors) to charge the Minnesota rate of 12% without a membership fee. Such action will destroy the entire cardholder base of any Minnesota bank operating under Minnesota law. Once local Minnesota banks are forced out of the bank credit card market, the out-of-state national banks will be permitted to raise their interest rate charges to 18% or beyond depending upon the law of the state where the national bank is located. In point of fact, a national bank located in a state without interest rate limits will be permitted to charge in Minnesota whatever the market will bear. Without competition from local state and national banks, there is no limit on those rates.

The majority of the Minnesota Supreme Court, in its decision, has now said to the Minnesota Legislature that insofar as out-of-state national banks are concerned, the State of Minnesota is powerless to adopt legislation which will limit the interest rate which such banks may charge when they elect to come into Minnesota and systematically and continuously solicit Minnesota residents. As a corollary, the Minnesota Legislature has been told that it is apparently powerless to prevent state legislatures of other states from dictating the interest rates which Minnesota residents shall pay in credit transactions.

The suggestion that, although the result in this case is unfair, it is up to Congress to resolve the problem, is not helpful. Interest rates are peculiarly a matter of local state law and Congress is not apt to take action until the problem has reached nationwide proportions. By that time, the ability of the Minnesota banks to compete with out-of-state banks will have been irreparably impaired.

In view of the foregoing, we respectfully request that the Supreme Court of the State of Minnesota grant Respondent's Petition for Rehearing and affirm the trial court's decision below.

Dated: Nov. 21, 1977.

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STATE OF MINNESOTA  
IN SUPREME COURT

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NO. 47561

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THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, INTERVENOR,

Respondent.

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REPLY OF APPELLANT TO PETITION  
FOR REHEARING

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APPELLANT'S REPLY TO PETITION FOR REHEARING

Respondent's petition is based on three assertions, none of which involve matters which the Court "overlooked, failed to consider, misapplied, or misconceived within the meaning of Rule 140, Rules of Civ. App. Proc. Indeed the presence of three dissents and a concurring opinion by the Chief Justice indicate the case received an unusually intense and thorough consideration.

I

PROCEDURAL HISTORY

Respondent asserts that the Court gave undue weight to the procedural history of this case, claiming that U.S. District Judge Alsop's decision to remand, 422 F.Supp. 1346, was not affected by the dismissal of the Omaha Bank as a defendant when the case was in the Federal District Court (Petition, p. 4). This argument is made in response to the Court's observation (Opinion, p. 11) that it would be inappropriate to permit the use of procedural devices to obtain a substantive result inconsistent with that which would have been achieved in the federal court system in Minnesota.

First, it is clear that, even if the particular procedural history of this case is ignored, a contrary decision by this Court would have produced an unfortunate and unseemly conflict between the state courts of Minnesota and the U.S. District Court in Minnesota. The Minnesota Federal District Court would be obligated to adhere to the decision of its superior appellate court in *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8 Cir. 1977). If this Court had reached a result contrary to the *Fisher* case, *supra*, thus binding the lower state courts in Minnesota, the substantive rights of a national bank would have become dependent upon which court system obtained jurisdiction in any future case; more to the point, the



substantive rights of a national bank would be dictated by whichever litigant was sufficiently swift or artful to avoid the jurisdiction of whichever court system adhered to a view contrary to its interest. We interpret the Supreme Court's references to the actual procedural history of the case to be merely illustrative of the need to avoid creating an intrastate conflict between the two court systems on matters of federal substantive law.

Moreover, respondent is demonstrably in error when it asserts that the dismissal of the Omaha Bank as a defendant made no difference to Judge Alsop. Judge Alsop took the view that dismissal of the Omaha Bank was critical because, as he stated:

"Because the claim against the Omaha Bank is the only one which arguably arises under the laws of the United States, there is no longer any claim arising under federal law before the Court." 422 F.Supp. at 1354.

He went on to say:

"It appears to this Court inappropriate to retain jurisdiction 'where the federal head of jurisdiction [to wit: the Omaha Bank] has vanished from the case and there has been no substantial commitment of judicial resources to the non-federal claims'." 422 F.Supp. at 1354.

As it developed, Judge Alsop was in error when he stated that the question of the application and meaning of federal law, 12 U.S.C. §85, disappeared with the dismissal of the Omaha Bank. He undoubtedly believed that, since federal law clearly preempted state law, the respondent Marquette would only pursue other unrelated state law claims upon remand. As it turned out, the nature of the case did not change upon remand although Judge Alsop cannot be faulted for his contrary prediction. In any event, the continued presence of the

Omaha Bank in the case would have severely jeopardized the respondent's efforts to keep the case in the state court and, as this Court observed, to avoid a change of venue to the federal court in Omaha (Opinion, Footnote 3).

It may well be that respondent Marquette was not seeking to avoid the 8th Circuit decision in *Fisher*, which was not decided until January, 1977; however, respondent was obviously maneuvering to avoid the federal courts. Respondent originally joined the Omaha Bank as a defendant in the state court; no good reason appears for the respondent's voluntary dismissal of the Omaha Bank other than as a part of a successful effort to defeat federal court jurisdiction. The success of this maneuver can be seen in the fact that if the case had remained in federal court, the Omaha Bank's credit card program would have been permitted to proceed in Minnesota by January 27, 1977, at the latest (the date of the 8th Circuit decision), and probably much sooner in view of the 7th Circuit *Fisher* decision rendered on July 29, 1976, 538 F.2d 1284. The federal district courts in one circuit are bound to give particular weight to decisions of another circuit's Court of Appeals in the absence of a controlling precedent in the home circuit. *Gustafson v. Wolferman*, 73 F.Supp. 186 (W.D. Mo. 1947); *Burton v. U.S.*, 139 F.Supp. 121 (D.Utah); 32 Am.Jur. 2d §415. The respondent Marquette's dismissal of the Omaha Bank was not only critical to Judge Alsop's decision, but was prompted by the Marquette's fear that the federal court system would be far more receptive to the argument that 12 U.S.C. §85 preempted the operation of any state law purporting to govern the interest rates of national banks. This fear had a sound basis in several decades of federal court decisions and, as it turned out, was well grounded as to the precise issue presented here. The dismissal of the Omaha Bank was, therefore, no in-

nocent afterthought but was a tactical maneuver designed to avoid a feared predetermined substantive result.

Finally, the respondent Marquette claims that this Court abandoned its duty to render an independent decision on the merits (Petition, p. 7); this contention is untrue and unfair to the Court. As we read the Court's opinion, the Court properly felt that it could not leave an important legal right dependent upon which court system in Minnesota was able to obtain jurisdiction. The Court exercised the highest degree of judicial responsibility.

## II

### THE 8TH CIRCUIT FISHER OPINION

The respondent argues that the 8th Circuit did not need to construe 12 U.S.C. §85 in reaching its result nor did it need to rely upon the 7th Circuit *Fisher* opinion. Respondent contends that the 8th Circuit opinion could have been based on ordinary choice of law principles.

We fail to understand the purpose of the argument. The fact is that the 8th Circuit *did* construe 12 U.S.C. §85 and made it clear that "choice of law" issues, i.e. whether the loan was "made" in Iowa or Nebraska, were immaterial. See 548 F.2d at 257. The 8th Circuit could hardly have avoided the issue since the plaintiff Fisher's primary cause of action was a claim of usury in violation of the National Bank Act, 12 U.S.C. §85, 548 F.2d at 256. Whether the Court of Appeals could have ducked the issue is of no importance; the Court properly performed its duty to render an interpretation of 12 U.S.C. §85. The respondent's suggestion that this interpretation was obiter dictum is manifestly absurd.

The respondent's contention that Minnesota Statutes §48.185 reflects a compelling state interest which should result in a contrary interpretation of 12 U.S.C. §85 misses the

point. Federal law in this area *preempts* state law no matter how "compelling" that state law is made to appear. The state legislature cannot alter the meaning of a federal preemptive statute by any state law, no matter how it is worded.

Moreover, there is no grounds for asserting that the state laws of Iowa, Illinois or Nebraska, involved in the *Fisher* cases, reflected any less of a state interest than does Minn. Stat. §48.185; the interests of the consumer in the *Fisher* cases could hardly be less compelling than the interests of the respondent Marquette which seeks in this litigation merely to avoid competition by use of §48.185.

## III

### COMPETITIVE AFFECT OF DECISION

The respondent envisages that this Court's decision will permit out-of-state national banks to drive the respondent and other domestic national banks out of business. The argument is based upon the false premise that Minnesota's national banks are compelled to charge 12% plus a \$10.00 or \$15.00 annual fee. (Petition, p. 15)

We have already pointed out in the appellant's brief that the Omaha Bank's 18% annualized rate with *no* annual fee costs less for most persons than the Marquette's 12% plus \$10.00 annual fee or the 12% plus \$15.00 provided in Minn. Stat. §48.185. This is so because bank credit card unpaid balances tend to be relatively low for at least two reasons: card holders tend to keep these balances low by taking advantage of the 30-day grace period so as to avoid the imposition of finance charges, and bank credit cards are not designed or used for large transactions on a continual month-by-month basis.

For most people, the Omaha Bank credit card is a more attractive proposition. However, as the unpaid balances increase, the Marquette's credit card becomes more attractive because



the \$10.00 annual fee has a progressively less percentage impact. For the higher balance customers, the Marquette has, at the present, a competitive edge pricewise.

The Marquette and other domestic national banks also have the distinct competition advantage of being located in Minnesota, each with a vast number of customers accumulated over the years to which these local banks are able to provide a full range of banking services apart from their credit cards. The Omaha Bank cannot match this advantage.

Moreover, the Minnesota national banks are not compelled to maintain their charges at 12% plus \$10.00 or \$15.00. The local banks are quite free to lower either the finance charge itself or the annual fee, or both, so as to bring the effective cost of their credit cards to a level which is equal to or below that of the Omaha Bank. Or, if the local banks feel that charging an annual fee is a competitive disadvantage, they can structure their rates under the Minnesota Small Loan Act, Minn. Stat. Chapter 56, so as to charge a higher interest rate and eliminate the annual fee. This is one of the options clearly available under 12 U.S.C. §85. *Fisher v. First National Bank of Omaha*, supra (8th Cir. 1977); *Northway Lanes v. Hackley Union National Bank*, 464 F.2d 855 (6th Cir. 1972); *Partain v. First National Bank of Montgomery*, 467 F.2d 167 (5 Cir. 1972).

The Marquette has not been joined in this case by any other Minnesota based national banks. Those other banks apparently do not see themselves driven from the marketplace by this Court's decision, or being placed in an untenable competitive posture. The Marquette simply does not like price competition, which occurs all too infrequently in the field of consumer finance. One of the key elements in the Marquette's successful lobbying of Minn. Stat. §48.185 was not merely the lucrative

yield afforded by the 12% plus \$15.00 price structure but also Subd. 7 of that Statute which ostensibly gave the Marquette, as a "competitively injured" bank, the standing to seek to enjoin an out-of-state bank which structured its rates so as to eliminate the need for an annual fee. Subd. 7 represents an effort to prevent the public from having this choice of rate structures and to eliminate or severely restrict the opportunity for price competition.

The spectre of an out-of-state national bank entering Minnesota at a predatory rate and then, having destroyed its competition, raising its rates to some unconscionable level is more a product of Marquette's counsel's imagination than it is of economic or legal reality. Such a scenario has no application to the Omaha Bank. Moreover, no bank would be willing to suffer the losses it must first withstand when it knows that other national banks can quickly re-enter the Minnesota market at competitive rate levels thus preventing the "predator" from enjoying the rewards of its temporary hold on the market. The ability of such banks to move rapidly into Minnesota is amply demonstrated by the events following the passage of Minn. Stat. §48.185 in which several new bank credit card programs popped up almost overnight, both domestic and out-of-state.

The threat of "importation" of rates from a state having no interest rate limitation is no threat at all; there are no such states and, even if there were, 12 U.S.C. §85 provides the very unattractive alternative of compelling such a bank to charge 7% simple interest or 1% in excess of the 90-day discount rate (unless, of course, such a bank chooses to structure its rates under Minnesota law).

We recognize that Justice Todd, writing for the majority, felt that 12 U.S.C. §85 produces "obvious inequities". We do



not agree that, as a practical matter, the federal statute creates inequities from the standpoint of the consumer; in the present case the result is to permit the consumer to have available a credit card which costs most people less money. The effect of 12 U.S.C. §85 upon local national banks is to place them in a position in which they will have to respond to the realities of effective price competition—a response which they are fully capable of making within the broad authority granted by 12 U.S.C. §85. We do not perceive it to be inequitable to require the Marquette to participate in a more competitive market.

The majority opinion nevertheless properly recognizes that the matter is one for Congress to determine, not the courts. Contrary to respondent's claim, the interest rates of national banks are not a matter of "local state law" (Petition, p. 16) but, in our federal system, are solely within the control of the federal Congress.

We submit that the Petition for Rehearing should be denied.

MACKALL, CROUNSE  
& MOORE

By Clay R. Moore  
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Bank Building  
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Phone: (612) 333-1341

STATE OF MINNESOTA  
IN SUPREME COURT

THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, INTERVENOR,

Respondent.

No. 47561

ORDER

Based upon all the files, records, and proceedings herein,  
IT IS HEREBY ORDERED that

1. The petition of respondent Marquette National Bank of Minneapolis for rehearing is denied.

2. The original opinion is amended by deleting therefrom the following language appearing on page 8 of the court's opinion, to-wit:

"By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system."

3. Respondent Marquette National Bank is herewith granted a stay of judgment pending application for writ of certiorari to the United States Supreme Court. The stay is conditioned upon the filing of a bond in the amount of \$10,000 with this court, approved by one of the justices of this

court. The stay is further conditioned that if Marquette National Bank fails to make application for writ of certiorari with the United States Supreme Court within the time period allotted therefor or fails to obtain an order granting its application or fails to make its plea good in the United States Supreme Court, it shall answer for all damages and costs which the appellant First of Omaha Service Corporation may sustain by reason of the stay.

Dated: December 8, 1977.

By the Court

Associate Justice

STATE OF MINNESOTA,  
SUPREME COURT

No. 47561

THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, INTERVENOR,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order and judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellant herein, do have and recover of respondent The Marquette National Bank of Minneapolis herein the sum and amount of Ninety-Four and no/100 ..... DOLLARS, (\$94.00) and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed December 14, 1977.

By the Court

Attest: JOHN McCARTHY

Clerk

#### STATEMENT FOR JUDGMENT

Statutory Costs \$25.00

Return \$5.00

Printer \$44.00

Postage and Express \$

Clerk \$20.00

Appeal Bond \$

Acknowledgments \$

Transcript \$

Total \$94.00

Satisfaction of Judgment filed before the above judgment is duly satisfied in full and discharged of record.

State of Minnesota

Supreme Court—ss.

I, John McCarthy, Clerk of said Supreme Court, do hereby state that foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears the original remaining of record in my office; that I have carefully compared the within copy with said original the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul March 7, 1978.

JOHN McCARTHY

Clerk

By WAYNE TSCHIMPERLE

Deputy

STATE OF MINNESOTA  
IN SUPREME COURT

NO. 47561

THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA,

Intervenor

Respondent.

Appellant's Motion to Vacate Stay

The appellant First of Omaha Service Corporation moves the Court for its order vacating the stay of judgment contained in paragraph 3 of its Order of December 8, 1977 (see copy attached) on the grounds that respondent Marquette National Bank has failed to make timely application for a writ of certiorari with the United States Supreme Court and has, thereby, failed to comply with the conditions of said stay.

Facts and Argument

On November 10, 1977, this Court rendered its decision that a Nebraska national bank was entitled under 12 U.S.C. §85 to charge interest rates on bank credit cards in accordance with either the laws of its home state or the state in which it was doing business. In so ruling, this Court reversed the judgment of the district court which had granted a permanent injunction which compelled compliance with the credit card rate structure set forth in Minn. Stat. §48.185.

On December 8, 1977, this Court denied the respondent Marquette's petition for rehearing but, at the same time, stayed its judgment until the respondent Marquette could seek, and have disposed of, a writ of certiorari in the United States Supreme Court. The stay was expressly conditioned on a timely application for certiorari.

The period of time allowed for filing a petition for writ of certiorari is 90 days. See 28 U.S.C. §2101(c). The 90 day period ended on March 8, 1978 and, on that date, no petition for a writ had been received by undersigned appellant's counsel nor had such a petition been filed with the United States Supreme Court (this has been verified by the clerk of that Court).

In those cases where a petition for rehearing in the lower court has been filed (as here) the time for filing a petition for a writ of certiorari begins on the date of the decision denying the petition—December 8, 1977, in this case.

In *Citizens Bank of Michigan City v. Opperman*, 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330 (1919) the Court stated:

"Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months limitation [for certiorari] begins to run from date of such denial or other disposition." 249 U.S. at 450, 63 L.Ed. at 702.



And, in *U.S. v. Adams*, 383 U.S. 39, 15 L.Ed.2d 572, 86 S.Ct. 708 (1966) in footnote 1, the Court referred to a motion to amend a judgment, comparable to a petition for rehearing. It said:

"[W]here a timely motion is filed, the time [for certiorari] in such cases runs from the date of the order overruling the motion." 383 U.S. at 41, fn. 1, 15 L.Ed.2d at 574, fn. 1.

Thus the U.S. Supreme Court has made it clear that the 90 day period in this case expired on March 8, 1978, 90 days from the date of the order denying rehearing.

The respondent Marquette, by obtaining the stay, was granted rather extraordinary relief. It was enabled thereby to keep out of the Minnesota market a competing credit card which offered a clear cost advantage to Minnesotans even though this Court had ruled that the injunction should not have been granted in the first instance. The Marquette has had an extra three months free of this competition and has made no effort to comply with conditions of the stay. The Marquette can, under the circumstances, be fairly asked to strictly comply with the terms of the stay or lose its benefits.

We believe it appropriate, in addition, to point out another irony created by the stay order. The First of Omaha Service Corporation, and the First National Bank of Omaha, have been effectively enjoined from operating in Minnesota as they wish to do. Yet some other national bank located in another state would have the absolute right to market its credit card in Minnesota using the more competitive rate structure allowed in several surrounding states including Nebraska. Those banks could do so because of this Court's ruling in this case, yet the prevailing appellant, and its parent bank, are legally enjoined and may have to suffer the frustration of observing

other banks freely operating in Minnesota under the protection of this Court's decision. The bank credit card business is highly competitive, and this appellant and its parent cannot fairly be enjoined while others may come into this market without fear.

The failure of the Marquette to seek certiorari within the required time and the increasing unfairness of continuing to restrain the appellant compel, we submit, that the order granting a stay of judgment be vacated and that the mandate to the district court be issued accordingly.

Dated: March 10, 1978.

Date of Submission: March 18, 1978.

MACKALL, CROUNSE  
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STATE OF MINNESOTA  
IN SUPREME COURT

NO. 47561

THE MARQUETTE NATIONAL  
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA,

Intervenor  
Respondent.

ORDER

Based upon all the files, records and proceedings herein,  
IT IS HEREBY ORDERED that appellant's motion to va-  
cate the stay of judgment of the order of this court dated  
December 8, 1977, be, and the same is, hereby denied.

Dated: 4-10-78.

By the Court:  
ROBERT J. SHERAN  
Chief Justice

In The  
**Supreme Court of the United States**

**OCTOBER TERM 1977**

**NO. 77-1258**

Supreme Court, U. S.

**FILED**

**MAR 17 1978**

**MICHAEL RODAK, JR., CLERK**

**THE STATE OF MINNESOTA, by WARREN  
SPANNAUS, its Attorney General,**  
*Petitioner,*

vs.

**FIRST OF OMAHA SERVICE CORPORATION,**  
*Respondent.*

**NO. 77-1265**

**THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,**  
*Petitioner,*

vs.

**FIRST OF OMAHA SERVICE CORPORATION,**  
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MINNESOTA**

**BRIEF FOR RESPONDENT IN OPPOSITION**

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In The  
**Supreme Court of the United States**

**OCTOBER TERM 1977**

—o—  
**NO. 77-1258**  
—o—

THE STATE OF MINNESOTA, by WARREN  
SPANNAUS, its Attorney General,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

—o—  
**NO. 77-1265**  
—o—

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

—o—  
**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MINNESOTA**  
—o—

**BRIEF FOR RESPONDENT IN OPPOSITION**  
—o—

**OPINION BELOW**

The Respondent accepts the statement of Opinion  
Below of the Petitioner Marquette National Bank of  
Minnesota.

—o—  
**JURISDICTION**

Although the Petitioners each allege that jurisdiction  
of this Court is based upon 28 U. S. C. 1257(3), Respond-



ent contends that this Court lacks jurisdiction over this cause by reason of the provisions of 28 U. S. C. 2101(c), in that the decision appealed from was entered on November 10, 1977 (B. App. A-47, S. App. A-1),<sup>1</sup> the running of the 90 days in which to file a petition for writ of certiorari was tolled by the filing of a motion for rehearing and commenced running again on the 8th day of December, 1977 when the order denying the rehearing was entered (S. App. A-18; B. App. A-49), and expired on March 8, 1978. The petition for a writ of certiorari was filed on March 13, 1978 after the expiration of the time for applying for a writ of certiorari, which time had not been extended by a Justice of this Court.

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### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, Respondent relies upon 28 U. S. C. 2101(c) (R. App. 1) and Article III, Section 2, Paragraph 2 of the Constitution of the United States which provides:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned,

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<sup>1</sup> References to the Appendix herein will be set forth as S. App. for the appendix filed by Petitioner State of Minnesota, B. App. for the appendix filed by Petitioner Marquette National Bank and R. App. for the appendix filed by this Respondent.

the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The following statutes are also cited and reprinted in the Appendix:

Minnesota Statutes	§ 56.13
Nebraska Revised Statutes	§ 8-820

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### QUESTION PRESENTED

Whether a national bank located and established in Nebraska may charge interest in its bank credit card program to residents of Minnesota at rates allowed by the law of Nebraska in spite of the fact that such rates may be greater than those which are purportedly allowed by a Minnesota statute to national banks located and established in Minnesota?

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### STATEMENT

First National Bank of Omaha conducts a bank credit card program in which, under certain circumstances, interest is charged to its customers. The rate of interest charged is specifically authorized to banks in making personal loans by the statutes of the State of Nebraska.<sup>2</sup> First National Bank of Omaha is organized, established

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<sup>2</sup> Nebr. Rev. Statutes § 8-820 (R. App. 6).

and located in Omaha, Nebraska. Its credit card program involves contracts between the Bank and individual cardholders. It also involves contracts with other banks and with merchants. These latter contracts may be with the Bank or with a wholly owned subsidiary of the Bank, First of Omaha Service Corporation, the Respondent here. In no instance does Respondent enter into agreements with cardholders and it does not extend credit or assess or collect interest from cardholders. Except, after assignment of a delinquent account from the Bank, Respondent may collect interest as an incident to collecting such accounts (B. App. A-8 - A-12; S. App. A-25 - A-28).

The rate of interest charged by First National Bank of Omaha, in some but not all cases, might exceed that permitted by the Minnesota statute referred to in Petitioners' application for certiorari.<sup>3</sup>

As amplified by the foregoing and with the exception of the unsupported and inaccurate conclusion that:

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<sup>3</sup> The actual amount charged for the credit, expressed as a percentage per annum under the Minnesota statute, would vary with the amount of credit outstanding for a period of time because of the effect of the "annual fee". Thus, if a cardholder had an average balance outstanding of \$100 but paid his entire account each month, he would be paying 15% under the Minnesota statute if he were charged a \$15 annual fee. The same cardholder under First National Bank of Omaha's credit card program would pay no interest whatever. Further, under First National Bank of Omaha's plan each cardholder is assured of 25 day's credit with no interest charge on his purchases. Under the Minnesota statute the only period of time for which the periodic rate would not be charged (in addition to the annual fee) would be when the entire balance was paid during the billing cycle. That is, although the purchases portion of the account might be billed without charge, unless that entire amount were paid prior to the next billing, interest would be calculated from the date the purchases were debited to the account.

"This ruling leaves an out-of-state national bank free to charge a higher interest rate to Minnesota customers than that allowed a state or national bank located in Minnesota."

found on page 4 of Petitioner State of Minnesota's application for certiorari, the statement of the case by that Petitioner is accepted.

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## ARGUMENT

### Reasons for Denying the Writ.

#### I.

#### The Application for the Writ was Not Timely Filed.

In their Petitions, Petitioners each assert, erroneously we think, that the judgment of which review is sought was entered on December 14, 1977. In so doing each of them refers to a judgment, basically for costs (S. App. A-18; B. App. A-50), entered over the signature of the Minnesota court's clerk after the entry of the order denying the petition for rehearing entered on December 8, 1977 by a justice of that court (S. App. A-19; B. App. A-48).

It is clear from the previous decisions of this Court that:

"Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months limitation [for certiorari] begins to run from the date of such denial or other disposition."

*Citizens Bank of Michigan City v. Opperman*, 249 U. S. 448 (1919). See also *Department of Banking v. Pink*, 317 U. S. 264 (1942); *Foreman v. U. S.*, 361 U. S. 416 (1960); *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144 (1942); *U. S. v. Healy*, 376 U. S. 75 (1964).

In view of the provision of the order denying the petition for rehearing that:

“Respondent Marquette National Bank is herewith granted a stay of judgment pending application for a writ of certiorari to the United States Supreme Court.” (S. App. A-18, B. App. A-48).

it is clear that nothing further was to be done in that court prior to the expiration of the time allowed in which to file the petition for certiorari. It may even be questioned whether the “judgment” of December 14, 1977 (S. App. A-19, B. App. A-50) was authorized.

Since the time for filing the petition for a writ of certiorari is fixed by Congress in the exercise of its power to prescribe exceptions and regulations of this Court’s appellate jurisdiction (Article III, Section 2, Paragraph 2, United States Constitution), compliance therewith has been held to be jurisdictional. *Department of Banking v. Pink*, 317 U. S. 264 (1942). The order of the Minnesota Supreme Court denying the petition for rehearing was entered on December 8, 1977, thus completing all requirements of finality. The time for filing for certiorari commenced on that date and expired on March 8, 1978. Since there was no order enlarging such time, the filings were not timely. The Court should deny review for lack of jurisdiction.

## II.

The ruling of the Court below applies a well established principle of law consistently with previous decisions of this and other Federal courts.

Although both petitioners contend that the decision of the Minnesota Supreme Court is erroneous and that it determines a new question which has not been previously ruled upon, examination of the authorities demonstrates conclusively that the decision reached by the Court below was based upon principles of law which were first announced by this Court as long ago as 1874 and which have been consistently applied by other courts since that time.

This Court has repeatedly held that § 85 preempts the direct operation of any state law purporting to control the interest rates of a national bank. In *Farmers & Merchants National Bank v. Dearing*, 91 U. S. 29 (1875), the Court held a New York usury law to be superseded by the National Bank Act stating:

“In any view that can be taken of the 30th section [now § 85] the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.” 91 U. S. at 35.

And, in *Hazeltine v. Central National Bank*, 183 U. S. 132 (1901), the Court stated:

“We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the National Banking Act, and not by the law of the state [citing *Dearing*, supra]” 183 U. S. at 134.



State law, of course, is relevant to the operation of § 85 but only to define the available range of options to a national bank in its selection of an interest rate. The Courts of Appeal have correctly construed § 85 to permit a national bank to select any state interest law it wishes as the basis for its charges including the state's small loan laws which typically provide the highest of all regulated interest rates. See *Northway Lanes v. Hackley Union National Bank*, 464 F. 2d 855 (6 Cir. 1972); *Par-tain v. First National Bank of Montgomery*, 467 F. 2d 167 (5 Cir. 1972); *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8 Cir. 1977).

In no sense can state law, in this case Minn. Stat. § 48.185, directly control the rates of a national bank. Note further that the cases cited above rule out the application of any state penalty or remedy for usury against a national bank. That area, likewise, has been preempted by 12 U. S. C. § 86 which provides the exclusive remedy against a national bank.

National Banks, at least in the area of the rate of interest which they are permitted to charge, are not limited to a status of equality with state banks. They are entitled to a "most favored lender status". That is, National Banks are permitted to charge the highest rate of interest allowed to any lender by the law of the state in which they are located.

This principle was first expressed by this Court in *Tiffany v. National Bank of State of Missouri*, 18 Wall 409 (1874). In that case this Court said:

"The claim of plaintiff is, that the general provision of the act of Congress, that national banking

associations may charge and receive interest at the rate allowed by the laws of the state where they are located, has no application to the case of defendants, and that they are restricted to the rate allowed to banks of issue of the state, that is to eight per cent. This, we think, cannot be maintained." *Id.* at 411.

and

"In harmony with this policy is the construction we think should be given to the 30th section of the act of Congress which we have been considering. It gives advantages to national banks over their state competitors. It allows such banks to charge such interest as state banks may charge, and more, if by the laws of the state more may be charged by natural persons." *Id.* at 412.

That decision was followed in *Daggs v. Phoenix National Bank*, 177 U. S. 549 (1900) where it was said:

"The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it." *Id.* at 559.

These interpretations of the law have been consistently applied by the courts through the years. See *First National Bank of Mena v. Nowlin*, 509 F. 2d 872 (8 Cir. 1975); *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976) cert. den. 429 U. S. 1062 (1977); *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8 Cir. 1977); *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F. 2d 855 (6 Cir. 1972); *Acker v. Provident National Bank*, 512 F. 2d 729 (3 Cir. 1975); *Haas v. Pittsburgh National Bank*, 526 F. 2d 1083 (3 Cir. 1976).

The holdings of the courts concerning this point appear to be nearly unanimous. In the face of such unanimity, arguments concerning congressional intent, supported by references to and quotations from the Congressional Globe seem superfluous, especially when they were previously made and rejected by this Court in *Tiffany v. National Bank of State of Missouri*, 18 Wall 409.

Petitioners, however, further claim that such decisions are distinguishable on the grounds that they did not involve interstate loans. Of course, the two Fisher cases, *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), and *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8 Cir. 1977) did involve interstate loans. The Petitioners attempt to distinguish these cases on the ground that an alternate basis for decision was available, that the small loan rates of the states of residence of the borrowers would have permitted the rates charged. This late attempt to introduce a new issue into the case ought not to be tolerated. Let it suffice to say that the small loan rate of Minnesota<sup>4</sup> would have permitted the rates charged by First National Bank of Omaha and the same result, for the same reason of federal preemption, would have followed had the question been timely raised.

Petitioners cite only two cases to support the proposition that the laws of the borrower's residence rather than the laws of the state where the national bank is located should control.

<sup>4</sup> See Section 56.13, Minnesota Statutes as set forth in the Appendix (R. App. 3).

*Colorado National Bank of Denver v. Coder*, No. 34682 (Mont. Dist. Ct. 1972) is a decision of a state trial court. *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E. D. La. 1969) can be of no precedential value in view of the order granting a new trial entered by the court in that case. (R. App. 7).

The statements and arguments by Petitioner Marquette that:

"The construction placed upon the National Bank Act by the Minnesota Supreme Court places Minnesota state and national banks in a competitive disadvantage with respect to out-of-state national bank credit card operations; (Brief p. 12)

"What is at stake in the instant case is a determination of whether § 85 of the National Bank Act is to be construed as permitting competitive inequality between national banks established in different states but conducting business in the same state; (Brief p. 18, 19) and

"National Banks located outside of the State of Minnesota by offering their bank credit card "free" without a membership fee of \$15 per annum, have a substantial, illegal competitive advantage over petitioner and all other state and local national banks operating bank credit programs in this state." (Brief p. 22)

find no support in the record, but reflect unsupportable, argumentative conclusions of petitioner. The thrust of the argument seems to be that allowing the Nebraska bank to charge a higher rate of interest, while prohibiting it from charging an annual fee somehow make the Nebraska bank card program more desirable to the cardholder (presumably because it is cheaper) than the Minnesota program (presumably because it is more expensive).

The Minnesota statute does not require an annual fee. If the Nebraska program is in fact cheaper and thereby more competitive, there is nothing to prevent the Minnesota bank from dropping or reducing its annual fee to meet such competition. If the complaint is that the Nebraska bank is better compensated under its system than the Minnesota bank and is therefore rewarded disproportionately to the Minnesota bank, there is absolutely nothing in the record to reflect the relative profitability of the two systems. In this connection, it might be noted that this action was not commenced by a cardholder complaining that he was being over charged. It was commenced by a Minnesota bank seeking to prevent Respondent from obtaining cardholders, presumably because Respondent's program was more desirable to the cardholder than the Petitioner's. That is, it could well be inferred that Petitioner desires to prevent price competition in the bank credit card business in Minnesota.

The contention by the Petitioner Minnesota that that state has a deeply rooted interest in protecting its citizens from usury must be viewed in the light of the Minnesota statutes which permit a rate of interest much higher than that charged by the Respondent in this case.<sup>5</sup> Minnesota's concern apparently is not to protect its citizens from such rates, rather, it is to prevent its banks from collecting such rates. A concern which since *Tiffany v. National Bank of State of Missouri*, 18 Wall 409 (1874), has been specifically held not to be enforceable against national banks.

---

<sup>5</sup> Minnesota Statutes § 56.13.

## CONCLUSION

The decision of the Court below includes a decision on a federal question of substance which has been previously determined by this Court and the lower court's decision is consistent with the decisions of this Court. The question, although important, has been decided by this Court and that decision was held by the court below to be controlling.

For the foregoing reasons, it is respectfully submitted that these petitions for a writ of certiorari should be denied.

Respectfully submitted,  
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## **APPENDIX**

**APPENDIX**

28 U. S. C. § 2101. *Supreme Court; time for appeal or certiorari; docketing; stay*

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

## App. 2

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

### Minnesota Statutes § 56.13

#### 56.13 *Limitations of loans; Interest; Investigation charge*

Subdivision 1. Every licensee hereunder may lend any sum of money not to exceed \$1,200 in amount, and may contract for and receive thereon a charge at a rate not exceeding two and three-quarters percent per month on that part of the unpaid principal balance of any loan not exceeding \$300, one and one-half percent per month on that part of the unpaid principal balance of any loan in excess of \$300 but not exceeding \$600, one and one-quarter percent per month on any remainder of such un-

## App. 3

paid principal balance; provided in addition the licensee may collect from the proceeds of any loan an investigation charge of \$1 for each \$100, or fraction thereof, of the principal amount loaned, for expenses including any examination or investigation of the character and circumstances of the borrower, comaker or security, and drawing and taking the acknowledgment of necessary papers, filing fees, or other expenses incurred in making the loan; provided that no such charge shall be collected unless a loan shall have been made. The full amount of the investigation charge authorized by this subdivision shall be fully earned by the time a loan is made without regard to the expenses incurred and shall not be deemed interest; provided, however, if a loan for which an investigation charge was made is renewed within 12 months from the date of the loan, then 1/12 of such investigation charge shall be deemed earned for each month or portion thereof from the date of the loan to the date of renewal, and the balance thereof shall be refunded to the borrower. A loan shall be deemed to be renewed at the time the loan is paid in full if any part of such payment is made out of the proceeds of another loan from the same or affiliated lender. Not more than six months of accrued charges on the unpaid principal balance shall be included in any judgment entered on any loan made hereunder.

Subd. 2. No licensee shall induce or permit any borrower to split up or divide any loan. No licensee shall induce or permit any person, nor any husband and wife, jointly or severally, to become obligated, directly or contingently, or both, under more than one contract of loan at the same time for the purpose or with the result of obtaining a higher rate of charge than would otherwise be permitted by this section.



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Subd. 3. No charges on loans made under this chapter, except for investigation charges allowed in subdivision 1 of this section, shall be paid or received in advance, or deducted or discounted from the principal of the loan. Interest charges on loans made under this chapter, except as otherwise provided in subdivision 4 of this section, (1) shall be computed and paid only as a percentage per month of the unpaid principal balances or portions thereof, (2) shall be so expressed in every obligation signed by the borrower, and (3) shall not be compounded; provided that, if part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan, then the principal amount payable under such loan contract may include any unpaid charges on the prior loan which have accrued within two months before the making of such loan contract. For the purpose of computations a month shall be considered a calendar month and where a fraction of a month is involved a day shall be considered one-thirtieth of a month.

Subd. 4. In lieu of computing and collecting charges on actual unpaid principal balances or portions thereof, charges may be precomputed at the agreed monthly rate on scheduled unpaid principal balances of loans contracted to be repaid in substantially equal and consecutive monthly installments of principal and charges combined. The first installment payment may be more or less than succeeding payments to adjust for charges if the first installment period is more or less than one month. Payments on each such precomputed loan shall be applied to the total of principal and charges combined until the contract is fully paid, subject to a refund or credit of un-

App. 5

earned charges and to default and extension charges as follows:

(a) The refund or credit to the borrower for prepayment in full by cash, a new loan, renewal, refinancing or otherwise one month or more before the final installment date shall be that proportion of the total precomputed charges (after any adjustment for a first installment period of more or less than one month) which the sum of the monthly balances originally scheduled to follow the installment date nearest the date of prepayment in full bears to the sum of all originally scheduled monthly balances. If prepayment occurs at least fifteen days before the first installment date, the refund or credit to the borrower shall be the total precomputed charges less the amount of charges computed at the agreed rates on the actual unpaid principal balances of the contract for the time actually outstanding.

(b) For each full installment one or more full months past due according to the original terms of the contract, whether by reason of default or extension agreement and if the contract so provides, the licensee may receive a charge not exceeding the amount of refund or credit which would be required if the loan were prepaid in the full on the next to the last installment date multiplied by the number of full months such installment is so past due. Such charges may be collected as they accrue or at any time thereafter.

(c) If two or more full installments are in default for one full month or more at any installment date and if the contract so provides, the licensee may reduce the contract balance by the refund or credit which would be re-

quired for prepayment in full on such installment date and thereafter receive charges at the agreed rate computed on actual unpaid principal balances of the contract for the time actually outstanding. Charges so collected shall be in lieu of any default or extension charges which otherwise would accrue on the contract after such installment date.

Subd. 5. In addition to the charges herein provided for, no further or other amount shall be, directly or indirectly, charged, contracted for, or received. If any amount other than or in excess of the charge permitted by this chapter is charged, contracted for, or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, charges, or recompense whatsoever.

**Nebraska Revised Statutes § 8-820**

8-820. *Personal loans; interest on unpaid balance; fee in lieu of interest*

Subject to the provisions of sections 8-815 to 8-829, any registered bank may contract for and receive, on any personal loan, charges at a rate not exceeding eighteen per cent simple interest per year on the first one thousand dollars and twelve per cent simple interest per year on the balance over one thousand dollars. Notwithstanding the provisions of this section, a bank may charge a minimum fee of five dollars in lieu of interest on small loans.

**Minute Entry**

November 24, 1969

Heebe, J.

**THE MEADOW BROOK NATIONAL BANK**

versus

**SAM J. RECILE and WILSON P. ABRAHAM  
CIVIL ACTION NO. 67-341 SECTION B**

This cause came on for hearing on a previous day on the motion of the Meadow Brook National Bank for a new trial and amendment of judgment or, in the alternative, to correct a clerical mistake in the judgment, and the motion of defendant, Wilson P. Abraham, for amendment of judgment. The Court, having studied the legal memoranda submitted, having heard the arguments of counsel, and having considered all of the evidence, is now fully advised in the premises and ready to rule.

IT IS THE ORDER OF THE COURT that the motion of the Meadow Brook National Bank for a new trial, be, and the same is hereby, GRANTED.

/s/ Frederick J. R. Heebe

Clerk's Office, A True Copy, Feb. 24, 1976, Stephen Hill, Deputy Clerk, U. S. District Court, Eastern District of Louisiana, New Orleans, La.

Jerry A. Brown, Esq.

D. D. Howard, Esq.

Moise Steeg, Jr., Esq.

Matthew F. Belin, Esq.

JUL 6 1978

IN THE

MICHAEL RODAK, JR., CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-1258

STATE OF MINNESOTA, BY WARREN  
SPANNAUS, ITS ATTORNEY GENERAL,*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION and  
THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,*Respondents.*ON A WRIT OF CERTIORARI TO THE  
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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1977

No. 77-1258

STATE OF MINNESOTA, BY WARREN  
SPANNAUS, ITS ATTORNEY GENERAL,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION and  
THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
*Respondents.*

ON A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

BRIEF OF PETITIONER

Petitioner State of Minnesota appeals from the judgment of the Supreme Court of Minnesota which was entered on December 14, 1977, reversing the judgment of the Hennepin County District Court and invalidating on federal supremacy grounds Minnesota's interest limit on bank credit card accounts as applied to foreign national banks which engaged in the bank credit card business in Minnesota.

## OPINIONS BELOW

The opinion of the Hennepin County District Court is unreported and reproduced in full in the Joint Appendix at App. 123a.<sup>1</sup> The opinion of the Minnesota Supreme Court reported at 262 N.W.2d 358 (1977) and its unreported order denying rehearing are reproduced in full at App. 155a and App. 197a.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) to review the judgment of the Minnesota Supreme Court entered on December 14, 1977 (App. 198a). Judgment was entered pursuant to the Court's Order of December 8, 1977, denying the petition for rehearing of the Marquette National Bank of Minneapolis.

A petition for certiorari was filed with this Court on March 13, 1978. The Court granted certiorari on May 22, 1978, and ordered the matter consolidated for hearing with the appeal from the same decision filed by the Marquette National Bank of Minneapolis, No. 77-1265.

## QUESTION PRESENTED FOR REVIEW

Does 12 U.S.C. § 85 of the National Bank Act preempt Minnesota's 12% annual interest limit on open-end bank credit accounts so that a Nebraska national bank systematically soliciting Minnesota residents can charge those residents the 18% annual interest rate allowed on such accounts by the laws of Nebraska while all local state and national banks are limited to the 12% maximum rate prescribed by Minn. Stat. § 48.185 (1976)?

<sup>1</sup>"App." refers to the Joint Appendix filed for this appeal and the consolidated case of Marquette National Bank of Minneapolis v. First of Omaha Service Corporation, No. 77-1265.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the supremacy clause, Article VI, Clause 2, of the United States Constitution, which states in pertinent part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The pertinent statutory provisions are:

12 U.S.C. § 85 (Addendum 1) and Minn. Stat. § 48.185 (1976) (Addendum 2).

## STATEMENT OF THE CASE

The State of Minnesota, by its Attorney General, and the Marquette National Bank of Minneapolis (hereinafter "Marquette") are the petitioners in these consolidated actions. Marquette is a national bank located in Minnesota which operates a BankAmericard bank credit card program. Respondent First of Omaha Service Corporation (hereinafter "Service Corporation") is a wholly-owned subsidiary of the First National Bank of Omaha (hereinafter "Omaha Bank"), a national bank located in Nebraska. Like Marquette the Omaha Bank operates a BankAmericard bank credit card program, and its Service Corporation, which is registered as a foreign corporation in Minnesota, solicited Minnesota residents for the program until enjoined by the district court below.



Petitioner Marquette commenced this action in May, 1976, to enjoin the Service Corporation and the Omaha Bank from further solicitation of Minnesota residents and from charging Minnesota residents already enrolled in the Omaha Bank's bank credit card program interest at the Nebraska rate of 18% per annum. Marquette urged that Minn. Stat. § 48.185 (1976) limits the Omaha Bank's and the Marquette's Bank-Americard programs within Minnesota to a maximum charge of 12% per annum on unpaid account balances. The Service Corporation maintained that Minn. Stat. § 48.185 (1976)<sup>2</sup> is preempted by section 85<sup>3</sup> of the National Bank Act because the federal act allegedly authorizes an out-of-state national bank operating a bank credit card program in Minnesota to charge either the Minnesota rate permitted under section 48.185 or the applicable interest rate of its home state, whichever is higher. The State of Minnesota became an intervenor in this proceeding since a state law (section 48.185) was under constitutional attack by the Service Corporation.

On December 22, 1976, the state district court rejected the preemption claim and temporarily enjoined the Service Corporation from violating section 48.185. A permanent injunction was entered on February 18, 1977. The Service Corporation then appealed to the Minnesota Supreme Court. On November 10, 1977, the Minnesota Supreme Court with three justices dissenting reluctantly reversed the district court, holding that the Omaha Bank should be allowed to assess its Minnesota customers the higher Nebraska rate. This ruling leaves an out-of-state national bank free to charge a higher interest rate to Minnesota customers than that allowed a state or national bank located in Minnesota. In its decision, the Minnesota

<sup>2</sup> Addendum 2.

<sup>3</sup> Addendum 1.

Supreme Court acknowledged that this was an advantage that "appears to be contrary to the original purpose in adopting this particular section [section 85] of the National Bank Act." *Marquette National Bank v. First of Omaha Service Corporation*, — Minn. —, 262 N.W.2d 358, 365 (App. 155a). However, the Court felt constrained to reach the decision it did by the decision of the 8th Circuit Court of Appeals in *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977).

## SUMMARY OF ARGUMENT

The State of Minnesota argues that a Nebraska national bank must abide by the Minnesota usury law when it enters the state and solicits its residents for credit card accounts. This is the same law which applies to resident national and state banks.

The rate of interest a national bank may charge on a loan is governed by section 85 of the National Bank Act which, in its pertinent provisions, has remained virtually unchanged since its enactment in 1864. How the interest rate language of section 85 is to be interpreted is the critical question in this case.

Against respondent's claim that section 85 should be interpreted so as to preempt the applicable Minnesota usury law, the State of Minnesota demonstrates that Congress never intended to permit a bank from one state to export its state usury law to another state in order to obtain a competitive advantage. Although the literal wording of section 85 states that any loan by a national bank is governed by the law of the state in which the bank is located, a "plain meaning" interpretation of this section in the present context should be rejected because the Civil War Congress which enacted it sought to establish parity in interest limits between national banks and state

banks by leaving national banks subject to the local usury laws in effect in each state.

In adopting section 85, Congress was addressing a banking system in which banks made loans by handing their bank notes over the counter or by crediting the borrower's account at the bank. Banks did not travel to foreign states soliciting consumer customers; interstate open-end credit transactions were not contemplated. Congress thus has never addressed the question of which usury law governs a national bank when it enters another state to solicit loans. However, the Congressional policy expressed in the legislative debates leading to the enactment of section 85 reflect a policy of deference to local money market conditions as reflected in the usury laws of the several states.

The states have traditionally regulated national and state banks doing business within their communities. In particular, protection of the public by the setting of usury limits has long been a state concern, and Congress acquiesced in this local control when it refused to adopt a uniform interest rate for all national banks in 1864. Congress has done nothing since that time to reserve that power to itself.

Congress decided that a healthy national banking system could best be encouraged by assuring national banks the same interest limitations which governed competing lenders in each locality in which the new banking institutions were established. This policy would best be served by interpreting section 85, in the context of national bank loans in a foreign state, as incorporating the local usury laws which govern local national banks and other lenders in that state. Such an interpretation would also be consistent with the general practice for over a century of holding national banks accountable to non-discriminatory state regulation.

## ARGUMENT

### I. INASMUCH AS BANKING HISTORICALLY HAS BEEN SUBJECT TO A DUAL STATE AND FEDERAL SYSTEM OF REGULATION, STATE BANKING LAWS ARE VALID UNLESS THEY FRUSTRATE THE ESSENTIAL PURPOSE OF FEDERAL REGULATION.

#### A. Standards of Preemption Favor Preservation of State Authority.

In 1963, this Court established its well known two-part test to determine whether a federal law should preempt a valid state law. In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), the Court held that a state law was not preempted by federal law unless one of two persuasive reasons was demonstrably present: (1) that the nature of the regulated subject matter permitted no other conclusion than preemption; or 2) that Congress had unmistakably ordained that the field was preempted.

Since *Florida Lime*, this Court has expanded and clarified its policy that valid regulatory interests of the states are not easily to be preempted. In fact, the Court has consistently applied a strong presumption in favor of validating state laws challenged on preemption grounds.

*If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.*

*New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973) (emphasis added).

Illustrative of this concern for the rights of state governments are *DeCanas v. Bica*, 424 U.S. 351 (1976) and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). In *DeCanas*, the California courts ruled that a state law providing that no employer could knowingly employ an illegal alien was preempted by the Comprehensive Federal Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.* In reversing the state court, the Court sustained the state law even though it admittedly impinged on the traditional federal area of regulation of aliens. In doing so, the Court observed:

Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal law—was ‘the clear and manifest purpose of Congress’ would justify [preemption].<sup>4</sup>

424 U.S. at 357.

That a state may be free to enact legislation in areas where Congress has already acted, was most recently reaffirmed in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . This assumption provides assurance that, ‘*The federal-state balance \* \* \* will not be*

<sup>4</sup> Accord, e.g., *Malone v. White Motor Corp.*, 46 U.S.L.W. 4295 (April 3, 1978) (upholding Minnesota Private Pension Benefit Act against claim of preemption by National Labor Relations Act); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (upholding state trade secret law against claim of preemption by federal patent laws); *Goldstein v. California*, 412 U.S. 546 (1973) (upholding a state law making it a criminal offense to “pirate” recordings against claim of preemption by copyright clause of United States Constitution.)

*disturbed unintentionally by Congress or unnecessarily by the courts.’*

430 U.S. at 525.

Jones also emphasized that preemption claims require careful analysis of state and federal policies. The relationship between the federal and state laws as they are interpreted and applied is as important as the explicit statutory language. *Jones v. Rath Packing Co.*, *supra*, 430 U.S. at 525-526, 540-541.<sup>5</sup> Unless, under the circumstances of the case, the state’s law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”<sup>6</sup> there is no need to find preemption.

When the legislative history of section 85 is considered [*infra* at Argument III], there can be little doubt that Congress did not intend by the language contained therein to preempt the field of state interest rate regulation. Contrary to respondent’s assertion there is no clear Congressional expression of preemption in the federal statute at issue here as required by *Florida Lime*. Neither is it true that the nature of the regulated area, state interest rates, is such that the subject matter permits no other conclusion than use of federal preemption, *Florida Lime & Avocado Growers, Inc.*, *supra*.

It is submitted that Minn. Stat. § 48.185 (1976) does not

<sup>5</sup> See also *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973) in which the Court stated:

[C]onflicting law absent repealing or exclusivity provisions, should be pre-empted . . . only to the extent necessary to protect the achievement of the aims of the federal law, since the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.

<sup>6</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).



stand as an obstacle to the execution and accomplishment of the full purposes and objectives of Congress when it enacted section 85. Since the time that section was first adopted it has been federal policy that national banks compete for loans on an even footing with local banks.

Certainly, there is no evidence that Congress intended otherwise. It is noteworthy that Congress has never acted to overturn the long-standing holding of this Court that "national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States." *First National Bank in St. Louis v. Missouri*, 263 U.S. 656 (1923).

**B. It Is Well Known That State Laws Have Traditionally Been Held Applicable To National Banks In Many Aspects Of Their Business, A Situation Which Congress Has Never Seen Fit To Alter By Amendment To The National Bank Act.**

Congress is fully aware that the states have reserved to themselves certain regulatory powers over national banks. This fact has been repeatedly made clear by the many statutes and cases which have so held. For example, in *First National Bank v. Walker Bank*, 385 U.S. 252, 259 (1966), the Court, in examining the Congressional history of § 36(c) of the National Bank Act decided that national banks would be permitted branches "only in those States and to the extent that State laws permit branch banking."<sup>7</sup>

<sup>7</sup> In the Walker case, the Court examined the history of § 36(c) of the National Bank Act and stated:

It is not for us to so construe the acts to frustrate this clear-cut

This Court has also determined that national banks are subject to state laws in the area of escheat laws, *Anderson v. Lockett*, 321 U.S. 233 (1944); that national banks are subject to state laws requiring all banks to submit to the state for taxing purposes a list of stockholders' names, number of shares and money actually paid on the shares even though there is a federal law already requiring a posting at the bank of all shareholders' names, *Waite v. Dowley*, 94 U.S. 527 (1877); that national banks are subject to state laws requiring that as a depository of state funds, a national bank become subject to a state law requiring the giving of a security bond for double the amount of the deposit, *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559 (1934),<sup>8</sup> and that national banks are

purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption. To us it appears beyond question that the Congress was *continuing its policy of equalization first adopted in the National Bank Act of 1864*.

385 U.S. at 261 (emphasis added). Section 36(c) had a parallel history to the adoption of § 85, with extensive debates and the final compromise between the opposing sides, resulting in leaving the issue of whether or not branches would be permitted to the discretion of the individual states.

<sup>8</sup> The Court also held that when the national bank became insolvent, the bonding company as successor to the state's interest, had a general lien on the assets of the national bank wherever banks organized under the laws of that state had that same power. This result was necessary in order to achieve Congress' purpose of placing national and state banks in a position of competitive equality. In giving the Court's opinion, Justice Brandeis stated:

For the main purpose of the 1930 [Bank] Act was to *equalize the position of national and state banks*; and without such power [to act as depository of state funds upon the pledging of a general lien] national banks would not in Georgia be upon an equality with state banks in competing for deposits. *The policy of equalization was adopted in the National Bank Act of 1864 and has ever since been applied*, in the provision concerning taxation; in the amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization. 292 U.S. at 564-565.

subject to a state's laws regarding the compounding of interest. *Citizens' National Bank v. Donnell*, 195 U.S. 369 (1904).

Similar issues have been addressed by Circuit and District Courts. In *American Timber & Trading Co. v. First National Bank*, 511 F.2d 980 (1973), the Court held that a national bank could not compute interest at a rate which would be usurious under state law. In *First National Bank in Mena v. Nowlin*, 509 F.2d 872 (1975), the Court held that a state law prohibiting the discounting of loans at the maximum state interest rate, where discounting resulted in a loan yield in excess of the maximum state interest rate, would be applied to a national bank's loan transactions.

Finally, in *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La., 1969), the federal District Court was faced with a question almost identical with the one at bar. The transaction occurred in Louisiana between a New York national bank and a Louisiana citizen. In holding that the applicable law was that of Louisiana, the Court concluded that section 85 fixed the rate of interest only in the state in which the national bank was located; it does not govern transactions by a national bank in other states. Instead, these foreign transactions are governed by the interest rates fixed by the state in which the transaction occurs. The Court felt that this was the best way in which to effectuate the purpose of the National Bank Act, *i.e.*, to give competitive equality to national banks.

All of these cases are demonstrative of the great extent to which national banks are subject to state regulation. Congress has purposely acquiesced in this regulatory relationship so that, in so far as government supervision is concerned, all banks in a given market area would be on an equal competitive footing. Yet, respondent's interpretation of section 85 would

tip the competitive balance in its favor. It urges in effect that Congress intended to permit national banks to roam the country's market places free of the regulatory limitations which restrain the local competition. However, this position is hardly harmonious with the principle of local regulatory equality; it is almost certain to inhibit the benefits that flow from robust but fair competition in an open market place.

Preemption takes place when Congress determines that there should be national uniformity within the given regulatory area. Yet respondent's position would impute to Congress an intention just the opposite of uniformity. Taken to its logical conclusion, respondents claim that Congress intends that there could be up to 50 different interest rates charged for the same credit card transactions in Minnesota. Surely, the rules governing preemption do not require that Minnesota's usury rates be replaced in Minnesota, through the vehicle of section 85 with the State of Nebraska's interest rates.

Thus, applying the Court's criteria for determining preemption, and considering the historical subjection of national banks to the regulations of the states where the banks do business, section 85 should be construed so as to uphold Minn. Stat. § 48.185.

## II. PROTECTION OF ITS CITIZENS FROM USURIOUS INTEREST CHARGES IS A TRADITIONAL EXERCISE OF A STATE'S POLICE POWERS WHICH HAS LONG BEEN RECOGNIZED BY CONGRESS AND THIS COURT.

Rates of interest for banking and commercial transactions have traditionally been governed locally. The legislatures of each of the 50 states have in force interest rate regulations

for various transactions.<sup>9</sup> Minnesota has shown for many years its strong concern about interest rates. The earliest Minnesota usury statutes were modeled after earlier New York and English statutes. *Jordan v. Humphrey*, 31 Minn. 495, 497 (1884).<sup>10</sup> Minnesota's legislature in recent years has passed usury statutes dealing with several types of credit transactions.<sup>11</sup> Annually, bills have been introduced in the legislature to raise the interest rate on credit card transactions from 12 percent to 18 percent. The failure of these bills demonstrates the strong belief of this state in a 12 percent limit on interest charged in retail credit transactions by consumers.

As explained in detail [*infra* at Argument III], the Civil War Congress which debated what is now section 85 rejected a uniform national usury rate for national banks in favor of state-by-state regulation. Judge Kantorowicz of the Hennepin County District Court, in his opinion enjoining respondent Service Corporation from charging Nebraska's higher interest rate, relied heavily on the history of Congressional deference to state legislation in this area:

Since the founding of our republic, congress, by its legislation, has allowed states to set their own interest rates. . . . To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years stand-

<sup>9</sup> Table of interest rates for 50 states—1 Consumer Credit Guide (CCH) § 510 (1978).

<sup>10</sup> The severe forfeiture provisions of the early Minnesota usury statutes were upheld in *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 152 U.S. 351 (1899).

<sup>11</sup> Many sections of Minnesota statutes contain specific interest rates and specific methods of calculating interest. Examples would be Minn. Stat. §§ 334.011 (agricultural loan statute adopted in 1976); 334.16-334.181 (consumer credit statute adopted in 1971); 47.20 (conventional mortgage statute, adopted in 1976) to mention just a few.

ing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.<sup>12</sup>

This Court early recognized the primacy of state interest rate regulation in the affairs of national banks. In refusing to review an Illinois court's application of state usury law to a national bank, the Court emphasized that the National Bank Act did no more than protect national banks from discriminatory state legislation:

[T]he true construction of state legislation is a matter of state jurisprudence, and, while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law, but only to see that such rule is equally enforced in favor of national banks.

*Union National Bank v. Louisville R.R.*, 163 U.S. 325, 331 (1896) (citations omitted.) Thus, the authority to regulate interest rates, including the interest rates charged by national banks, has consistently been recognized as a matter for state control.

<sup>12</sup> Findings of Fact, Conclusions of Law, and Order for Partial Summary Judgment of the Hennepin County District Court (No. 726526, Feb. 10, 1977), at App. 123a.



**III. THE CIVIL WAR CONGRESS WHICH ENACTED SECTION 85 WAS ADDRESSING A FINANCIAL SYSTEM IN WHICH INCORPORATED BANKS DID NOT TRANSACT BUSINESS OUTSIDE THEIR HOME STATE, AND THUS COULD NOT HAVE CONTEMPLATED SUCH BUSINESS. HOWEVER, THE CONGRESSIONAL DEBATES ON SECTION 85 DISCLOSE A POLICY OF PLACING NATIONAL BANKS IN PARITY WITH OTHER LENDERS OPERATING WITHIN EACH STATE. IN THE CONTEXT OF THE MODERN BANK CREDIT CARD BUSINESS, THIS POLICY MANDATES THAT EACH STATE DETERMINE THE INTEREST RATE FOR BANK LOAN TRANSACTIONS WITHIN ITS BORDERS.**

An examination of both the history of banking in America and the debates surrounding the adoption of section 85, demonstrate that Congress always intended that banks doing business in a given state be bound by the same interest rate. As a necessary result, section 85 cannot be read to preempt Minnesota's usury limit and instead apply the interest limit of another state to Minnesota loan transactions.

**A. The National Bank Act of 1864 Restricted National Banks to Transacting Business At One Location.**

The pertinent provision of section 85 has remained virtually unchanged<sup>13</sup> since its enactment as section 30 of the National Bank Act of 1864. 13 Stat. 99, 108. The 1864 Act made clear that the newly authorized national banking institutions could

<sup>13</sup> The only change in the pertinent provision has been the addition of the phrase "or existing" in 1874. This addition is discussed *infra*, at 30.

transact business only at their home offices. Section 6 of the Act required a bank to designate in its organization certificate the "particular county and city, town or village" in which it was to operate. 13 Stat. 101 (1864). Section 8 of the Act specified that a bank's "usual business shall be transacted at an office or banking house specified in its organization certificate." 13 Stat. 102 (1864). As this Court recently noted in construing the venue provision of the Act, "[t]here can be little question . . . that at the time the 1864 Act was passed the activities of a national bank were restricted to one particular location." *Citizens & Southern National Bank v. Bouslog*, — U.S. —, 98 S. Ct. 88, 93 (1977).

**B. The Practices of Incorporated Banks in the Era Immediately Preceding Enactment of the National Banking System Supports the View that Congress Did Not Contemplate a National Bank Soliciting Customers and Entering Loan Agreements Outside of the State in Which It Was Established.**

The banking system of the mid-nineteenth century bears little resemblance to America's present banking structure. From the dismantling of the Second Bank of the United States by the Jacksonians in the 1830's until the creation of the national banking system in the National Currency Act of 1863 and the National Bank Act of 1864, the federal government had no direct role in banking.<sup>14</sup> Banks incorporated under state law issued bank notes which served as the nation's cir-

<sup>14</sup> The federal government's influence on the monetary system during this period was confined to placement of government funds and requirements of payment in specie for money owed the government.

culating currency.<sup>15</sup> These banks engaged in the exchange of bank notes, short-term loans, discounting commercial notes, and very limited long-term investments. They were overshadowed in the lending business by merchants and by "private bankers." The merchants and private bankers engaged in a broad range of transactions, including interstate loans.<sup>16</sup> Incorporated banks were local institutions more limited in the scope of their banking practices. Available history does not indicate that incorporated banks issued loans other than at their own offices.<sup>17</sup> The private bankers could establish branches in all the commercial centers of the nation and thus enjoyed an advantage over incorporated banks which were either prohibited by state law from establishing any branches or, at most, permitted to establish branches within their home states. Redlich, *supra*, 72-73. Private bankers dominated the long-term credit market and played a strong role in both exchange dealings with English banks and domestic exchange. *Id.*, at 67-70.

In contrast, incorporated banks had a local or statewide orientation and their loan transactions were of an "over-the-counter" nature. A study done for the Comptroller of the Currency states:

Depositors could draw checks on their accounts, . . .

<sup>15</sup> More than 1500 state banks issued their own notes in the mid-nineteenth century. R. Robertson, *The Comptroller and Bank Supervision: A Historical Approach* (1968), 29.

<sup>16</sup> The interstate character of private loan transactions is illustrated by the two cases decided by this Court during the antebellum period which concerned application of usury laws to loans between parties in different states. Both cases involved private lenders. *Miller v. Tiffany*, 68 U.S. (1 Wall.) 298 (1863); and *Andrews v. Pond*, 38 U.S. (13 Pet.) 65 (1839).

<sup>17</sup> The rise of the private banking houses from merchants and stockbrokers around mid-century is described in detail in F. Redlich, *The Molding of American Banking: Men and Ideas (Part II, 1840-1910)* (1951), ch. XIV.

[b]ut more often both individuals and business firms made payments in cash. Thus, when a bank officer made a loan, he either credited the borrower's checking account with the amount or, more frequently, handed over the proceeds of the loan in bank notes, which the borrower would then use to pay his workers or remove his other obligations.<sup>18</sup>

Similarly, a contemporary observer noted that city banks made loans by crediting the net proceeds of the loan to the account of the borrower at the bank.<sup>19</sup> The local orientation of incorporated banks was reinforced by the problems borrowers faced when they sought to make payment in notes of an out-of-town bank. Notes issued by Baltimore banks were accepted at a 1 to 2 percent discount in Washington, and Washington notes were likewise discounted in Baltimore.<sup>20</sup> Larger discounts were required on exchange of notes of Western banks.<sup>21</sup>

There are no parallels in the lending practices of mid-nineteenth century banks to the bank credit card account of today.<sup>22</sup> The Minnesota Act, as drawn in issue here, concerns "a continuous and systematic solicitation" of Minnesota residents for an open-end credit account by a foreign national bank. Minn. Stat. § 48.185, subd. 6 (1976). This kind of credit

<sup>18</sup> R. Robertson, *supra*, 15.

<sup>19</sup> C. Raguet, *A Treatise on Currency and Banking* (1839).

<sup>20</sup> R. Robertson, *supra*, 16.

<sup>21</sup> Discounts of up to 15 percent were demanded by New York banks redeeming notes of Western banks. See House debate on the redemption provisions of 1864 Act as summarized in J. Knox, *History of Banking in the United States* (1900), 240.

<sup>22</sup> Bank credit cards first appeared in this country in New York in 1951. They became widespread in California after the introduction of Bank Americard in 1959. Large scale use of the cards nationwide began in 1966. B. Klebaner, *Commercial Banking in the United States: A History* (1974), 171-172.

arrangement with residents of a distant state would have been difficult to imagine in an era of over-the-counter loans.

**C. The Congressional Debates on Section 30 of the National Bank Act of 1864 Disclose the Congressional Policies of Leaving to Each State the Determination of the Maximum Interest to be Charged Within its Borders.**

The Civil War created a need for a uniform national currency that could be freely issued and would be accepted for the purchases necessary to the Union's conduct of the war.<sup>23</sup> The National Currency Act of 1863 and the National Bank Act of 1864 set up the national banking system with the intention of establishing the notes of national banks as a uniform national currency. As the Congressional debates of 1864 illustrate, Congress was aware that new bank notes could not change the economic facts that incorporated banks were confined to local markets and their loans governed by diverse local circumstances. Accordingly, Congress deferred to local circumstances in rejecting a uniform interest rate for national banks and leaving the matter to state-by-state regulation.

The national banking system had been created by the National Currency Act of 1863. 12 Stat. 665 *et seq.* Section 46 of the Currency Act had provided that national banks could charge interest at the rate which the law in each state imputed to an agreement in the absence of an express interest provi-

<sup>23</sup> The Union's money problems are examined in B. Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* (1968).

sion.<sup>24</sup> In 1864, Congress considered proposed amendments to the 1863 Act,<sup>25</sup> including a proposal to establish a uniform national rate of interest for national banks.

The uniform rate proposal was favored by Representative Hooper of Massachusetts and Senator Sherman of Ohio, the sponsors of both the 1863 Act and the proposed amendments of 1864.<sup>26</sup> The opposing views on a uniform rate were voiced in the House debates of March, 1864. Stevens of Pennsylvania, Chairman of the Ways and Means Committee, argued in favor of a uniform rate because "it is for the purpose of equalizing the opportunities for investment everywhere." Cong. Globe, 38th Cong., 1st Sess. 1353 (1864). Blaine of Maine, arguing for an amendment which would have continued the effect of the 1863 provision, emphasized the different economic conditions between his home district and the district represented by Hooper of Massachusetts. He wanted national banks in

<sup>24</sup> Section 46 stated:

That every association may take, reserve, receive, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, such rate of interest or discount as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws of the several states.  
12 Stat. 678-679 (1863).

<sup>25</sup> The amendments which gave rise to the greatest controversy appear to have been those concerning state taxation of national banks, apportionment of circulation among the states, and redemption of national bank notes by other national banks. See Knox, *supra*, ch. XIV.

<sup>26</sup> Hooper's view is expressed in floor debates in Cong. Globe, 38th Cong., 1st Sess. 1257 (1864); Sherman at 2126.



Maine to charge interest reflecting the economic situation in Maine:<sup>27</sup>

But I say that representing, as I do, an agricultural and manufacturing district in the State of Maine, I should be ashamed to go home and look them in the face if by my vote they should be required hereafter, if they desire to borrow a dollar, to pay one-sixth more to the capitalists who live in my friend's district than they have ever been called upon to pay before; and every gentleman from New England who represents an agricultural and manufacturing district will be held to the same accountability.

Now, if the committee will vote down the amendment offered by the chairman of the Committee of Ways and Means, we will stand just where we stood yesterday, leaving each State to regulate this thing just as it pleases. In Maine, we have already regulated it, fixing it at six percent. In New York it is seven percent. And we have had very large commercial connections with New York, and got along very comfortably and very prosperously with both. Let New York have her seven percent. Let Maine have her six percent. And if California wants her two percent, per month, let her have it.

Cong. Globe, *supra* at 1375-1376.

<sup>27</sup> One of the contemporary justifications proffered for interest regulation in an era marked by a laissez-faire outlook was that such regulations were "but legislative findings of fact as to the market value of money, issued to guide borrowers." Friedman, *The Usury Laws of Wisconsin: A Study in Legal and Social History*, 1963 Wis. L. Rev. 515, 520. Although the shortcomings of legislative findings as to market rates were appreciated at the time, the laws were considered useful because "both the market and legal rates of money differed widely from place to place." *Id.* This justification for usury laws, strange as it may seem today, may have had influence on the desire in Congress to leave interest regulations to state legislatures best apprised of local market conditions.

Deference to local economic conditions, argued by Blaine in defense of the low interest rates of Maine, was also favored by Cole of California in discussing the very high interest rates prevalent in his state. *Id.* at 1376. Cole argued that a uniform interest rate would not serve the primary goal of a strong uniform currency. A strong currency required strong national banks in all parts of the nation. If national banks in California were limited to the proposed uniform rate of 7% and could not charge the higher rates determined by the market, they would not attract capital and would not prosper. *Id.* Cole assailed the illogic of two prescribed rates of interest for banks in the same location, one for national banks and another for state banks:

What is the consistency or propriety of having two rates of interest established by law in the same community? What is the benefit of having two systems of usury in the same State? Here, while a transaction with one individual is lawful, with another it is unlawful. There is a difference if done with one class from what there is if done with another. I cannot see any propriety in it.

*Id.*

The Blaine amendment passed on March 30, 1864,<sup>28</sup> but the entire bill was tabled on April 8 as a result of the dispute over state taxation of national bank capital.<sup>29</sup> The bill in its original form, with the uniform interest rate provision, was again introduced by Hooper on April 11. The interest provision was not debated further and the uniform rate provision was included in the bill adopted by the House on April 20.

<sup>28</sup> Cong. Globe, *supra*, at 1353.

<sup>29</sup> A summary of the progress of the bills and the debates in April, 1864, is found in Knox, *supra*, at 254-255.

The Senate version of the bill, introduced by Sherman on April 8 and referred to the Finance Committee, took the position of the Blaine amendment. The House bill and the Senate version with the committee amendments came to the Senate floor in late April. Floor debates on the interest provision did not begin until May 5. It is clear from that debate that in committee, or otherwise,<sup>30</sup> the proponents of a uniform rate had been defeated and had accepted that defeat. Sherman, the sponsor, stated:

I should prefer a general uniform rate of interest, six or seven percent; but that has been found to be impracticable. . . . We found that the attempt to fix a uniform rate of interest would create so many disputes and rivalries and troubles that we finally had to yield that point.

Cong. Globe, *supra* at 2124.<sup>31</sup> The view which had prevailed was that expressed by Blaine and Cole in the House and reiterated by Trumbull of Illinois in the Senate debate:

I think, if any good is to arise from these banking institutions [national banks], the law should be so formed that they may be established in all parts of the country; and it is no interference with State authorities, or with the authority of the different states to control this rate of interest. The State of Kansas may do it or the State of Iowa, or the State of Illinois, or any State, and there can

<sup>30</sup> Petitioner has been unable to locate any reports or minutes of the Finance Committee's deliberations in April, 1864.

<sup>31</sup> Sherman added later in the debate:

My own preference . . . having been overruled. . . I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its own laws.

Cong. Globe, *supra* at 2126.

be no complaint by the people of these States if it is left to the control of their legislatures but the bill will be worthless in a large portion of the country if a uniform law rate of interest is fixed, and no banks will be established under it.

Cong. Globe, *supra* at 2124.

The Senate engaged in some discussion over which interest rate should apply to national banks in those Western states which allowed banks a rate different from the general rate.<sup>32</sup> Ultimately, it adopted the language of the Finance Committee subject to a proviso for those states with multiple rates.<sup>33</sup> The House approved the Senate version on May 24, 1864.

In brief, the uniform national rate failed because Congress believed that the loans of each national bank must be in parity with the rate of interest current in the bank's locality. Congress recognized that interest rates varied widely, particularly in the Western states, and that continued deference to local interest regulation was the means to parity. As noted earlier, Congress in 1864 could not have conceived of the precise matter at issue here because national banks were then confined to making loans at their home office. But had Congress contemplated a Nebraska national bank seeking to make consumer loans in Minnesota in competition with Minnesota banks, it

<sup>32</sup> This discussion is examined further, *infra*, at 32.

<sup>33</sup> The provision adopted read:

That every association may take . . . interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take . . . a rate not exceeding seven per centum . . . .

Cong. Globe, *supra* at 2145.

would have desired the Nebraska bank to be in parity with the local market and thus subject to the interest regulation of Minnesota. Any suggestion that the Nebraska bank could avail itself of Nebraska rates in its business in Minnesota would have been rejected with the same reasoning employed by Cole of California in the House debate:

What is the consistency or propriety of having two rates of interest established by law in the same community? What is the benefit of having two systems of usury in the same State?

Cong. Globe, *supra* at 1376.

Moreover, the suggestion that interest rates could be "exported" to another state by a national bank would have conflicted with the Congressional policy of promoting a uniform national currency by developing strong national banks in all parts of the nation. Congress would not have wanted a local national bank, bound by its home state's interest regulations, to suffer a competitive disadvantage because a national bank from a foreign state could compete in the local market with immunity from the state interest regulations governing the local bank.

**D. Although The Court Below Felt Constrained to Follow The Rulings of The Seventh and Eighth Circuits in The Fisher Cases, The Reasoning of the Fisher Cases Is In Conflict With The Congressional Policy Behind Section 85 And Should Be Rejected.**

The Minnesota Supreme Court recognized that the Minnesota Act was a non-discriminatory regulation which applied uniformly to all banks doing business in the state. (App. 168a) It also noted that permitting a Nebraska national bank to

export its home state's interest rates to Minnesota seemed "inconsistent with the original purposes of the [national] banking act and contrary to the expressed local interest of the state." (App. 169a). Nonetheless, it refused to consider the matter on a clean slate (App. 165a) and reluctantly followed the ruling in *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977) ("Fisher II"), allowing a national bank to export its home state's interest rates.

The Eighth Circuit ruling was an alternative holding presented without any analysis. The court first affirmed the district court's choice of law ruling in favor of the bank. 548 F.2d at 256-257.<sup>34</sup> The court then added that § 85 provided an additional basis for its ruling, citing the recent Seventh Circuit ruling in *Fisher v. First National Bank of Chicago*, ("Fisher I"), 538 F.2d 1284 (7th Cir. 1976), cert. denied 429 U.S. 1062 (1977).

The Seventh Circuit's *Fisher I* decision is the only reported decision offering any rationale for interpreting § 85 to allow a national bank to impose its home state's interest rates on loan transactions in another state.<sup>35</sup> The *Fisher I* rationale

<sup>34</sup> Choice of law considerations have not been raised in this case and could have no bearing because the Minnesota legislature has clearly stated the law to govern the bank credit card agreements at issue.

<sup>35</sup> The only federal case to address the issue directly before *Fisher I* was *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969). The court considered the question "one of first impression and concluded that § 85 did not authorize a New York national bank to charge on a Louisiana loan a rate of interest permitted under New York law but prohibited under Louisiana law. The court reasoned:

We do not think Congress intended this provision to serve as a haven for national banks which, located in states with little or no restriction as to the interest rate, charge interest on loans made in other states in excess of that allowed by the laws of those states. This, too, would frustrate the congressional purpose of the equality between national and state banks regarding the interest rate.

It might be suggested that had Congress intended this result,



cannot withstand analysis for it ignores both the Congressional intent behind § 85 and the practices of mid-nineteenth century banking. *Fisher I* addressed section 85 in two stages: Initially, it examined the first clause of § 85:

Any association may . . . charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located.

Then it looked to the effect of the second clause:

except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

In discussing the first clause, the court refused to look beyond the "plain meaning" of the statute. It rejected the district court's view<sup>36</sup> and the holding in *Meadow Brook National*

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it could have readily been more explicit. The statute, however, was passed in 1864, over one hundred years ago, and we cannot believe that Congress foresaw, at that time, the financial fluidity which exists today. At that time, it was undoubtedly most unusual for a national bank to make a loan in a state other than the state where it was located. Even today, while it is not unusual, banks are hesitant to do so.

302 F. Supp. at 74. This holding is supported by dicta in two other federal decisions. *Schumacher v. Lawrence*, 108 F.2d 576 (6th Cir. 1940), and *Haas v. Pittsburgh National Bank*, 60 F.R.D. 604 (W.D. Pa. 1973).

<sup>36</sup> In an unreported opinion, the District Court for the Northern District of Illinois has stated:

Although Section 85 is silent as to the permissible rate of interest on loans made to borrowers situated in states other than where the national bank is located, this Court feels that under such situations the permissible rate would be defined by the laws of the state in which the borrower is situated. However, a national bank making such a loan would retain its "most favored lender" status within the parameters of that state's laws.

*Fisher v. First National Bank of Chicago*, No. — (N.D. Ill. June 13, 1975), quoted in *Fisher I*, *supra*, 538 F.2d at 1288.

*Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969),<sup>37</sup> that § 85 was silent on the question. The court stated:

We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on "any loan" is governed by the rate allowed "where the bank is located."

*Fisher I*, *supra*, 538 F.2d at 1290-1291.

Reliance on the "plain meaning" of a federal statute to the exclusion of its legislative background has been sharply criticized by this Court. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colo. Pub. Int. Research Group*, 426 U.S. 1, 9-10 (1976). The argument for examining legislative history has even greater force in the present case because the banking system has been radically transformed from that which existed when the statute was enacted more than a century ago. An examination of the legislative background, as presented *supra*, would have revealed the error of this "plain meaning" interpretation. It would have disclosed that Congress could not have contemplated the export of interest rates of 1864 but that Congressional policy would oppose such export because it would be contrary to the stated objective of granting national banks an equal competitive basis in local markets.

The *Fisher I* analysis of the second clause of § 85, the exception for states with special bank rates, concludes that the "most favored lender" doctrine read into the clause by *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1873), would probably provide an additional ground for affirming the district

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<sup>37</sup> See n. 35, *supra*.

court. 538 F.2d at 1290. This analysis would not bear upon the present case<sup>38</sup> but for the court's observation on the phrase "or existing" in the exception clause:

After *Tiffany* was decided the exception was amended by Congress to apply it not only to associations "organized in any such State," which would be redundant inasmuch as the first clause applies to the same state, that is, where the bank is located, but to apply the exception also to associations "organized or existing in any such State."<sup>11</sup> In this case the defendant bank appears to "exist" in Iowa, although in our view of the case we need not determine whether it does or not.

<sup>11</sup> The *Tiffany* language appeared in the National Bank Act of June 3, 1864, 13 Stat. 99 (so quoted by the Supreme Court as late as *Farmers' and Mechanics' Bank v. Dearing*, 91 U.S. 29, 31, 23 L.Ed. 196 (1875)). The addition of "or existing" appeared shortly thereafter in the Revised Statutes of 1878 in § 5197 and seems to have been first so quoted in *National Bank v. Johnson*, 104 U.S. 271, 26 L.Ed. 742 (1881).

*Fisher I*, *supra*, 538 F.2d at 1291. The court suggests, without deciding, that the phrase "or existing" might provide further support for the view that § 85 sanctions export of interest rates by a national bank.

As *Fisher I* notes, the origins of the "or existing" phrase are not known. It appears to have been added sometime between the *Tiffany* decision in 1873 and the issuance of the Revised Statutes of 1878. In the 1870's, as in the 1860's, national banks were restricted to one location. See *Citizens and South-*

<sup>38</sup> *Fisher I* found that the law of the transaction state (Iowa) allowed certain lenders to charge the 18 percent rate permitted the Illinois national bank under its home state's laws. It observed that application of the most favored lender doctrine to Iowa law would permit any national bank to charge 18 percent on Iowa loans. The most favored lender doctrine is not asserted in the present case and the *Fisher I* analysis is pertinent only because of its dicta as to the "or existing" phrase in the exception clause.

*ern National Bank v. Bougas*, *supra*, — U.S. —, 98 S. Ct. at 93. Thus, contrary to *Fisher I*, the phrase does suggest Congressional recognition of a national bank operating outside its home state.

A more likely explanation of the phrase is to be found in the conversion of state chartered banks to national banks in the decade following the Civil War. During the war, there were very few conversions by state banks. From the enactment of the National Currency Act in February, 1863, to enactment of the National Bank Act in June 1864, only 20 of the 456 national banks chartered were conversions from state banks<sup>39</sup> However, when Congress imposed a 10% tax on state bank note issue in 1865,<sup>40</sup> state banks rushed to apply for national charters so that they could regain the status of banks of issue. By 1873, 88% of the nation's commercial banks were chartered under the national banking system.<sup>41</sup> These banks were allowed to maintain their state charters where possible.<sup>42</sup> Thus, the 1870's amendment of "organized in any such State under this chapter" to "organized or existing in any such State under this chapter" may represent Congressional recognition that by 1873 a large number of national banks were institutions which had originally been "organized" under state laws but subsequently had qualified for national bank status and were now "existing" in the national bank system.<sup>43</sup>

<sup>39</sup> Robertson, *The Comptroller and Bank Supervision*, *supra* at 47.

<sup>40</sup> Act of March 3, 1865, 13 Stat. 484.

<sup>41</sup> This percentage is derived from a Federal Reserve study set forth in Robertson, *supra*, at 67.

<sup>42</sup> Robertson, *supra*, at 54.

<sup>43</sup> An alternative explanation of the "or existing" phrase can be drawn from the exhaustion of authorized national bank circulation which took place after the Civil War. Robertson, *supra*, 57-61, explains that the \$300 million limit on national bank note circulation authorized by the 1863 Act was reached by the late 1860's. The circulation was dominated by banks in the eastern and

Finally, *Fisher I* argues that the exception clause providing equality with state bank rates is redundant since the first clause, as interpreted by *Tiffany*, already provides national banks the highest rates available in a state. *Fisher I* is correct as to the redundancy but that observation sheds no light on the issue in the present case. At most, it shows that the *Tiffany* "most favored lender" doctrine was based on a misinterpretation of the legislative intent of § 30 of the 1864 Act. *Tiffany*, without analysis, cast aside the Congressional policy of national bank-state bank parity and, in doing so, rendered meaningless the exception clause. A more accurate reading of the Senate debates<sup>44</sup> would have shown that the bill's sponsor understood the first clause to be a restatement of § 46 of the 1863 Act which created parity with the general interest rate of each state;<sup>45</sup> that several senators from the high-interest Western states pointed out laws of their states allowing state bank rates higher than the general rates;<sup>46</sup> that an amendment was proposed on the floor to equate national

middle Atlantic states. Congress authorized an additional \$54 million of notes in 1870. As Robertson states:

Once again, the Southern and Western states failed to get their due. A decision of the Comptroller held that the new circulation had to be assigned to *banks with completed organizations*. *Id.* at 59 (Emphasis added).

This comment suggests that national banks in 1870 were divided into two classes: those with "completed organization" who were permitted to issue notes and those, primarily in the South and West, who were in some sense not complete and not permitted to issue notes. It is possible that the "or existing" phrase, which was enacted at this time, was a reference to the latter class of national banks. Since all restrictions on note issue were lifted in 1875, this classification of national banks most likely disappeared at that time and thus has received little attention.

<sup>44</sup> The debates appear in Cong. Globe, 38th Cong., 1st Sess. 2123-2127 (1864) and are discussed *infra* at 24.

<sup>45</sup> See comment of Sherman of Ohio confirming the view of Pomerooy of Kansas, Cong. Globe, *supra*, at 2125.

<sup>46</sup> See remarks of Grimes of Iowa, *id.* at 2123; Henderson of Missouri, *id.* at 2125; and Trumbull of Illinois, *id.* at 2126.

bank rates with state bank rates in those Western states;<sup>47</sup> that, with the single exception of Grimes of Iowa, all who spoke favored national bank-state bank equality; and that the final version which was worked out after the debate became mired in minor issues added the exception clause to assure parity in those Western states which had multiple interest rates.<sup>48</sup> For purposes of the present issue, the exception clause raised by the Circuit Court in *Fisher I* should be viewed as an expression of the Congressional policy of interest rate parity within a state between national banks and state banks. It cannot be presumed to speak to the present-day national system of bank credit cards. Neither in 1864 nor in the mid-1870's did Congress have in mind "a banking system that did not then exist."<sup>49</sup>

<sup>47</sup> Henderson's amendment, *id.* at 2125, 2127.

<sup>48</sup> These debates are discussed in Comment, 58 Iowa L. Rev. 1240 (1973), and in First National Bank in Mena v. Nowlin, 509 F.2d 872, 879-880 (8th Cir. 1975). The Comment provides useful background to the debates. However, its attempt to elevate the debate to a dramatic confrontation between the moneyed East and the developing West is not well founded. As noted *infra* at 21, the main issue as to interest was the uniform rate proposal. When that was resolved prior to the Senate debate, the only matter remaining was to draft the provision so as to assure that the consensus policy of strict national bank-state bank parity would govern in all the states, including the Western states such as Iowa with complex interest rate regulation.

<sup>49</sup> Citizens and Southern National Bank v. Bougas, — U.S. —, 98 S. Ct. 88, 93 (1977).



#### IV. THE POLICY OF COMPETITIVE EQUALITY AND THE SYSTEM OF DUAL REGULATION WOULD BE FURTHERED BY A DECISION UPHOLDING THE MINNESOTA ACT.

National banks are both public and private institutions. To some extent, they were created as instrumentalities of the federal government for certain specific federal purposes.<sup>50</sup> But, by and large, they are private institutions with a duty to their shareholders and a profit motive. Though chartered as national banks, the rule is that they are subject to state law unless the state law interferes with the purposes of their creation or their efficiency as a federal instrumentality, or is in direct conflict with a paramount United States law.<sup>51</sup>

The credit card business is not an area where a bank acts in its public capacity. It is strictly a private business. As a device for extending open-end credit to persons purchasing goods and services primarily in the state where they live and work, a credit card is obviously not a method for providing national currency nor marketing government loans. Thus, this is not a case where respondent's discharge of its so-called "public" function is in any way affected. Therefore, the only question is whether requiring a foreign national bank to abide by the same usury limit as a resident national bank is in conflict with a paramount federal policy.

As previously demonstrated, *supra*, Congress most likely intended that the disputed language in section 85 merely meant that national banks were to be bound by the same inter-

<sup>50</sup> They were created for the purpose of providing a currency for the whole country and a market for loans of the general government. *Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549 (1900); *Tiffany v. Nat'l Bank*, 85 U.S. (18 Wall.) 409 (1873).

<sup>51</sup> *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

est limits as applied to the local banks doing business in the same place. Consistent with this interpretation are the holdings of several federal courts in a closely analogous area. In *Alden's, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir., 1978); *Alden's, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.) *cert. denied*, 46 U.S.L.W. 3220 (October 4, 1977); and *Alden's, Inc. v. Packel*, 524 F.2d 38 (3rd Cir.), *cert. denied*, 425 U.S. 943 (1975), it was uniformly held that retailers, whether local or interstate in nature, are governed by a state's local interest rate when extending credit on credit card transactions. Thus, it appears obvious that there is, in effect, a national policy as to which interest rate should apply to open-end credit card transactions, and it is that which is espoused by petitioners. Conversely, it serves no public or commercial policy to enable a foreign national bank to destroy competitive equality and unfairly capture the credit card business within the state of Minnesota.<sup>52</sup>

In exercising its police powers to enact Minn. Stat. § 48.185, the Minnesota legislature has determined that an effective interest rate of 12% should prevail on bank credit card transactions within the state of Minnesota. It allows for an annual \$15 fee to be charged in addition to the interest rate. This is Minnesota's sovereign determination as to the limit of interest its citizens should have to bear for the every-day necessity of consumer credit. Nebraska has declared its citizens need the protection of an 18% effective interest rate on credit card transactions, but its law does not provide for the \$15 yearly charge. Each state has exercised its police powers and declared

<sup>52</sup> Being able to charge a full 6% more interest enables respondent to advertise its credit card as "free," while a national bank located in Minnesota which is marketing the same credit card is limited to a smaller interest rate and, thus, must charge a service fee in addition. Thus, it cannot advertise its card as "free."

its public policy regarding usury limits. When Nebraska was passing its law, its legislators were concerned with its local businesses and the citizens of Nebraska. They did not have the mandate or motivation to consider the oft-times competing needs of citizens of other states when enacting Nebraska law.

It is with the awareness that each state legislature is limited to exercising its sovereign powers for the benefit of its own citizens and others doing business within its borders that Congress entrusted to each state the power to set usury limits. In 1864, when Congress deferred to the exercise of local police powers in setting interest rates, it did not intend to allow national banks to export one state's interest rates into another. Legislative history demonstrates that Congress understood national banks to be confined in their loan transactions to the locality of their home office and wanted competitive equality within each local market for national banks, an equality that could not exist if a foreign national bank could escape an interest limit that applied to all local banks in the area.

This Court can effectuate the public policy of the states and the Congress by construing section 85 to mean that all banks doing business in a state are governed by the local usury limit. This construction would effectuate the desirable goal of competitive equality. Nebraska national banks would compete on the same terms in Minnesota as Minnesota national and state banks. Similarly, national banks from jurisdictions other than Nebraska, including those from Minnesota, would be bound by Nebraska's laws when soliciting loans in Nebraska. Moreover, the uniformity within each state resulting from such construction would free the citizens of each state from the confusion and uncertainty which would exist under the ruling below as to the costs of purchasing open-end credit. To allow otherwise would have the potentially anomalous result of al-

lowing 49 other states to impose their usury statutes upon the citizens of Minnesota.

## V. PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

In its order granting and consolidating the petitions of the State of Minnesota and The Marquette National Bank for writs of certiorari, the Court directed that the parties brief and argue the jurisdictional issue as to whether the petitions were filed within the time permitted by law.<sup>53</sup>

Pursuant to 28 U.S.C. §2101(c) (1970), the time for application to this Court for a writ of certiorari to review a judgment or decree of a state court in a civil action is limited to "ninety days *after the entry of such judgment or decree.*"<sup>54</sup> (Emphasis added.) It is important to note, therefore, that the Act of Congress which defines this Court's jurisdiction to entertain petitions for writs of certiorari specifies that it is from the date of entry of judgment that the period within which application for a writ must be made begins to run.<sup>55</sup> The decisions of this Court have further established that it is only a "final judgment" which may be reviewed upon writ of certiorari.<sup>56</sup>

Final judgment in this matter was entered in the Minnesota Supreme Court on December 14, 1977, from which date the period to seek review by this Court commenced to run.

<sup>53</sup> Order dated May 22, 1978, granting petitions for writs of certiorari in Nos. 77-1258 and 77-1265.

<sup>54</sup> "App. at —" (Emphasis added).

<sup>55</sup> Rule 22(3) of this Court specifies that a petition for a writ of certiorari in cases such as the instant one are deemed to be timely "when filed with the clerk within the time prescribed by law."

<sup>56</sup> See, e.g., *Costarelli v. Massachusetts*, 421 U.S. 193 (1975). See generally, Annot., 29 L. Ed. 2d 872 (1971).



The Minnesota Supreme Court handed down its opinion in this matter on November 10, 1977.<sup>57</sup> However, in accordance with the Rules of the Minnesota Supreme Court, judgment could not be entered upon the Court's opinion until ten days after filing of the decision.<sup>58</sup> The Rules further provide that the filing of a petition for rehearing operates to stay the entry of judgment.<sup>59</sup>

On November 21, 1977, a petition for rehearing was filed with the Minnesota Supreme Court, thereby staying the entry of final judgment.<sup>60</sup> The petition was denied by order of December 8, 1977, whereupon the final judgment of the Minnesota Supreme Court was entered by the Clerk of Court on December 14, 1977.<sup>61</sup> Therefore, as the final judgment of the Minnesota court was not entered until December 14, 1977, it is from that date that the 90 day period to seek review by this Court must be computed within the meaning on the face of 28 U.S.C. § 2101(c) (1970).<sup>62</sup>

Respondent First of Omaha Service Corporation asserts, however, that it is from the date that the Minnesota Supreme Court issued its opinion, rather than from the date of judgment, that the time period for seeking a writ of certiorari must be computed. If respondent's assertion was correct, the petitions of appellants, filed on March 13, 1978, would be untimely

<sup>57</sup> App. 155a.

<sup>58</sup> Rule 136.02, Minn. R. Civ. App. P.

<sup>59</sup> *Id.*; Rule 140, Minn. R. Civ. App. P.

<sup>60</sup> App. 172a. See, e.g., *Chicago Great W. R.R. v. Basham*, 249 U.S. 164 (1919).

<sup>61</sup> App. 198a.

<sup>62</sup> As was noted by petitioner, the Marquette National Bank, in its Reply in Support of Certiorari, the procedure on rehearing in the Minnesota Supreme Court, which operates to stay entry of judgment pending a decision of the petition, is in sharp contrast to the procedure under Rules 36 and 40, Federal Rules of Appellate Procedure, which provide for entry of judgment by the clerk upon receipt of the Court's opinion and for the filing of a petition for rehearing within 14 days after entry of judgment.

and subject to dismissal for want of jurisdiction in this Court.<sup>63</sup> The decisions of this Court have established, however, that where state law or local practice provides that judgment shall not be entered until after a petition for rehearing by an appellate court has been decided, the time for application for a writ of certiorari runs from the date that judgment is entered in the appellate court. In *Puget Sound Power & Light Co. v. King County*,<sup>64</sup> this Court was asked to review, upon the former writ of error, a July 10, 1922, judgment of the Washington Supreme Court. On October 15, 1921, a department of the Washington Supreme Court, which sits in two departments and en banc, filed its opinion. Washington law provides, by statute, that a decision of a department of the Washington Supreme Court does not become final until 30 days after it is filed, unless a petition for rehearing before the Court en banc is filed. If such a petition is filed and rehearing is permitted, the decision becomes final upon filing of the decision of the Court en banc. It is provided, however, that where a decision becomes final, a judgment shall issue thereon.

Upon rehearing in the *Puget Sound* case, the Washington Supreme Court en banc filed its opinion on June 12, 1922. On July 10, 1922, judgment affirming the decision of the lower court and awarding costs was entered on the minutes of the Court. A writ of error was sought on September 22, 1922. At the time of decision, the statutes provided that a writ of error must be applied for within three months after entry of the

<sup>63</sup> On March 18, 1978, respondent submitted a motion requesting the Minnesota Supreme Court to lift its stay of judgment pending disposition in this Court on the same grounds—the petition for certiorari was not timely filed. The Minnesota Supreme Court denied the respondent's motion by order of April 10, 1978. App. 204a.

<sup>64</sup> 264 U.S. 22 (1924).



judgment or decree of which review is sought.<sup>65</sup> This Court was, therefore, squarely faced with the question of whether the Washington Court's decision of June 12 or judgment of July 10 constituted the "judgment" from which Congress intended the appeal time to run. In writing for a unanimous Court, Mr. Chief Justice Taft observed:

It is apparent that however final the decision may be, it is not the judgment. It is said that the latter is a mere formal ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the State, which counsels seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress . . . fixing the time within which writs of error must be applied for and allowed.<sup>66</sup>

The petition was, therefore, held to have been timely filed. *Accord, Comm'r v. Estate of Bedford*, 325 U.S. 283 (1945).

The decisions of this Court clearly establish that where state law or local rule contemplates not only the delivery of an opinion but the formal entry of judgment in the appellate court, it is from the date of such judgment that the time to seek review in this Court begins to run.<sup>67</sup> As the Minnesota Supreme Court's rules plainly contemplate the entry of a judgment after a petition for rehearing has been determined,<sup>68</sup> it is

<sup>65</sup> Act of September 6, 1916, ch. 448, § 6, 39 Stat. 727.

<sup>66</sup> *Puget Sound Power & Light Co. v. County of King*, 264 U.S. 22, 25 (1924).

<sup>67</sup> As one commentary on this Court's appellate jurisdiction has observed, "The most elementary component of the final judgment requirement is that there must be a judgment." *C. Wright, A. Miller, E. Cooper & E. Gressman*, 16 *Federal Practice and Procedure*, § 4009 p. 569 (1977).

<sup>68</sup> Rules 36 and 40, Minnesota Rules of Civil Appellate Procedure.

from that judgment that a writ of certiorari must be sought.<sup>69</sup>

Respondent First of Omaha Service Corporation, however, in its Brief of Respondent in Opposition to Petition for Writ of Certiorari, cites several prior decisions of this Court for the proposition that filing of the Minnesota Supreme Court's Order denying rehearing on December 8, 1977, six days prior to the entry of the Court's judgment, was the last act to be taken in that court and, therefore, constitutes the final judgment of the Minnesota Court. These decisions, however, all presuppose the existence of a valid judgment below, and turn on the question of whether that judgment has become final for purposes of review in this Court. Therefore, none of the decisions cited by respondent are in point for the simple reason that at the time the Minnesota Court acted on the petition for rehearing, no judgment of that Court had ever been entered.<sup>70</sup> Respondent has thus confused the question of finality of the Minnesota Supreme Court's judgment with the threshold question of when judgment was entered in that court

<sup>69</sup> For a general discussion of U. S. Supreme Court Rule 22, governing the time requirements for filing a petition for writs of certiorari, see Annot., 28 L. Ed. 2d 960 (1971).

<sup>70</sup> *Citizens' Bank v. Opperman*, 249 U.S. 448 (1919) is inapposite as the state appellate court's judgment therein has been entered prior to the filing of a petition for rehearing. Denial of the petition was, therefore, properly held to have rendered the judgment final for purposes of review by this Court. *Department of Banking v. Pink*, 317 U.S. 264 (1942), is also of no help to respondent. That case stands for the proposition that where a final judgment of an appellate court contemplates a remand to a lower court to perform the ministerial act of entering judgment in the lower court, the time to seek review runs from the date of judgment in the appellate court and not the date of judgment upon remand. The *Pink* case is, therefore, consistent with this Court's holdings in *Puget Sound* and *Estate of Bedford* that the time period for review runs from the date of judgment in the appellate court. Other cases cited by respondent, which involve appeals from an administrative decision and in two criminal matters, are factually and procedurally dissimilar to the instant case. *United States v. Healy*, 376 U.S. 75 (1964) and *Forman v. United States*, 361 U.S. 416 (1960) (petition for rehearing in criminal case stays finality

for purposes of 28 U.S.C. § 2101(c) (1970).<sup>71</sup> Had the appellants followed respondent's reasoning and sought review of the opinion of the Minnesota Supreme Court in the absence of entry of judgment, this Court could have properly dismissed the petition for writ for failure of the record to reflect entry of judgment.<sup>72</sup>

The rules of the Minnesota Supreme Court clearly contemplate that judgment shall be entered in that Court upon the Court's opinion. This Court has previously held that where local rule or procedure contemplates the formal entry of judgment in the highest court below in which review can be obtained, it is from the date of that judgment and not from the date of the court's opinion that the time period to apply for a writ of certiorari must be computed. As the Minnesota Supreme Court's judgment was entered on December 14, 1978, it is from that date the 90 days to seek review must be counted. The petitions for certiorari were, therefore, timely filed, and this Court has jurisdiction to review the Minnesota Supreme Court's judgment on the merits.

of judgment entered); *Pfister v. Northern Illinois Finance Co.*, 317 U.S. 144 (1942) (an untimely petition for rehearing before an administrative agency which is not considered on the merits will not alter the time for appeal).

<sup>71</sup> Neither respondent nor appellants dispute the fact that the Minnesota Supreme Court's judgment is a final judgment for purposes of review by this Court. *See* Brief of Respondent in Opposition to Petition for Writ of Certiorari at 5-6.

<sup>72</sup> *National Life Insurance Co. v. Scheffer*, 131 U.S. cciii (1882) (where record before Supreme Court shows verdict and motion for new trial but no judgment on verdict, writ of error must be dismissed). It should be noted that respondent cannot argue prejudice due to the clerk's delay in entry of judgment in the Minnesota Supreme Court inasmuch as judgment was entered promptly. Furthermore, the Minnesota procedural rules create no potential for prejudice by delay in the entry of judgment, as Minnesota law permits either the prevailing or the losing party to compel entry of judgment in the Minnesota Supreme Court. *See* *D. M. Osborne & Co. v. Paulson*, 37 Minn. 46, 33 N.W. 12 (1887).

## CONCLUSION

Congress could not have contemplated the modern bank credit card system when it enacted the interest rate provision of § 85 of the National Bank Act in 1864. The Congressional policy evident in the debates on § 85 is to assure competitive equality in each locality between national banks and other lenders. When applied in the modern context of a foreign national bank entering another state to solicit bank credit card accounts, this policy requires that § 85 be construed as incorporating the interest rate of that state.

Based on the foregoing, this Court should reverse the decision of the Supreme Court of Minnesota and order it to reinstate the judgment of the district court granting partial summary judgment against the respondent.

Respectfully submitted,  
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Add-1

## ADDENDUM

*12 U.S.C. § 85. Rate of interest on loans, discounts and purchases.*

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance,



reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, unsular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558.

*Minn. Stat. 48.185 OPEN END LOAN ACCOUNT ARRANGEMENTS.* Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed \$7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed \$5,000, nor shall it extend such credit for any purposes other than personal, family, or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank;

(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first state-

Add-4

ment issued after the end of that billing cycle, no finance charge shall be charged on that balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

- (a) that the law of another state shall apply;
- (b) that the person consents to the jurisdiction of another state; and
- (c) which fixes venue;

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunc-

Add-5

tion prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the requirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.

[1976 c 196 s 5]

**IN THE**  
**Supreme Court of the United States**

October Term 1978

No. 77-1258

THE STATE OF MINNESOTA, by WARREN  
SPANNAUS, its Attorney General,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

No. 77-1265

THE MARQUETTE NATIONAL BANK OF  
MINNEAPOLIS,  
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vs.

FIRST OF OMAHA SERVICE CORPORATION,  
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ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

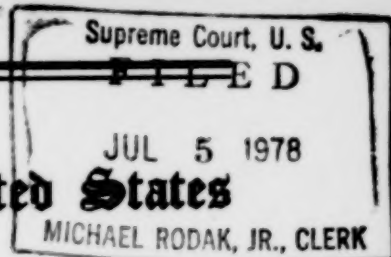
**BRIEF FOR PETITIONER THE MARQUETTE  
NATIONAL BANK OF MINNEAPOLIS**

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IN THE  
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THE STATE OF MINNESOTA, by WARREN  
SPANNAUS, its Attorney General,  
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vs.

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---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

---

BRIEF FOR PETITIONER THE MARQUETTE  
NATIONAL BANK OF MINNEAPOLIS

---

## OPINION BELOW

The Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment, and Memorandum opinion, of the District Court for the Fourth Judicial District, State of Minnesota (App. 123) is unreported. The opinion of the Supreme Court of the State of Minnesota (App. 154) is reported at — Minn. —, 262 N.W. 2d 358. The Order of the Supreme Court of the State of Minnesota denying petition for rehearing and amending the original opinion (App. 197) is unreported.

## JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was made and entered on December 14, 1977 (App. 198). The petition for a writ of certiorari was filed on March 13, 1978, and was granted on May 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

1. Whether the National Bank Act (12 U.S.C. §85) preempts Minnesota Statutes §48.185 and prohibits the State of Minnesota from regulating the interest rate charged Minnesota residents under a bank credit card program conducted within the State of Minnesota by a national bank having its principal place of business in a foreign state.

2. Whether the Petition for Writ of Certiorari was filed within 90 days after the entry of judgment by the Minnesota Supreme Court as required by 28 U.S.C. §2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions involved are Article VI, Clause 2 of the United States Constitution (Add. 1);<sup>1</sup> the National Bank Act, Title 12, United States Code, Section 85 (Add. 1); and, the Minnesota Bank Credit Card Act, Minnesota Statutes 1976, Section 48.185 (Add. 2).

## STATEMENT OF THE CASE

Petitioner is a national banking association established in the State of Minnesota. Since 1968, it has operated a bank credit card program (the "Marquette BankAmericard [VISA] program") in the State of Minnesota. Respondent, First of Omaha Service Corporation, is a wholly-owned subsidiary of the First National Bank of Omaha ("the Omaha Bank"), a national banking association established in the State of Nebraska, which also operates a bank credit card program (the "Omaha BankAmericard [VISA] program") in the State of Minnesota.

Petitioner brought suit in May, 1976, under Minn. St. §48.185 (Add. 2) to enjoin respondent and its parent, the Omaha Bank, from enrolling Minnesota residents in the Omaha BankAmericard [VISA] program, without conforming its interest rate structure to that established by the Minnesota Bank Credit Card Act, Minn. St. §48.185 (Add. 2). In addition to its claim for injunctive relief, petitioner also sought money damages incurred as a result of respondent's violation of Minn. St. §48.185 and for attorneys' fees as pro-

<sup>1</sup> Addendum, *infra*, hereinafter referred to as "Add. —."



vided under Minn. St. §48.185, Subd. 7 (Add. 5). *See*, Complaint (App. 6).<sup>2</sup>

Under the provisions of the aforesaid statute, a state or national bank, wherever located, when operating a bank credit card program in the State of Minnesota and soliciting Minnesota residents, is limited to imposing on credit card balances of Minnesota residents an annual interest rate of not more than 12 percent per annum, computed on the "average daily balance" of the customer's account. The respondent, however, has sought and continues to seek to offer the Omaha BankAmericard [VISA] program in the State of Minnesota with an annual interest rate of 18 percent on the first \$999.99 (computed at 1 1/2 percent per month on the previous balance of the customer's account) pursuant to Nebraska law.<sup>3</sup>

<sup>2</sup> On June 12, 1978, petitioner entered into an agreement for the sale and transfer of its BankAmericard [VISA] program. The actual closing of the transfer is subject to various conditions and is still several weeks away. Until such time as the aforesaid executory agreement becomes final, petitioner's position in the case remains unchanged. Upon the anticipated consummation of the sale and transfer of its BankAmericard [VISA] program, petitioner will no longer be in a position to pursue its claim for injunctive relief herein but will retain its causes of action for damages against respondent arising out of the violation of Minn. St. §48.185, and for attorneys' fees as provided under Minn. St. §48.185, Subd. 7.

Since petitioner's remaining causes of action for damages and attorneys' fees are dependent in part upon the constitutionality of Minn. St. §48.185, the determination of whether the National Bank Act (12 U.S.C. §85) preempts the interest rate requirements of Minn. St. §48.185 remains a "live" issue between petitioner and respondent and one in which petitioner has "a legally cognizable interest in the outcome." *Powell v. McCormick*, 395 U.S. 486, 496-500 (1969).

<sup>3</sup> From the date of entry of the initial injunction in this matter on December 22, 1976 (App. 65), until just shortly before writ of certiorari was granted, the Omaha Bank and respondent chose not to conduct the Omaha BankAmericard [VISA] program in the State of Minnesota even though there has been no restraint on their operation of such program as long as they complied with the interest requirements of Minn. St. §48.185. In May, 1978, the Omaha Bank and respondent commenced a new solicitation of the Omaha BankAmericard [VISA] program in the State of

At the time of the commencement of the suit, the Omaha Bank and its wholly-owned subsidiary, respondent, sought to conduct bank credit card operations in the State of Minnesota under Nebraska interest rates because of the opportunity afforded by the rate differential to establish a cardholder base in the State of Minnesota. Under the Minnesota Bank Credit Card Act banks are limited to charging an annual interest rate of 12 percent but are permitted to charge an annual membership fee of \$15. Prior to the entry of the injunction herein, the Omaha Bank and respondent proceeded to solicit Minnesota residents for purposes of enrolling them in the Omaha BankAmericard [VISA] program by offering the credit card "free." By offering the card "free," rather than with a membership fee, the Omaha Bank hoped to attract many Minnesota residents to the Omaha BankAmericard [VISA] program, who would otherwise have been required under Minnesota law to pay a fee for the privilege of obtaining a BankAmericard. The Omaha Bank could afford to offer the card "free" because of the Nebraska annual interest rate of 18 percent, whereas Marquette and other banks, limited to the 12 percent interest rate under Minnesota law, could not operate profitably without charging a membership fee. *See*, Harris Affidavit (App. 45).

Petitioner commenced its action in Hennepin County (Minnesota) District Court; however, the Omaha Bank sought to have the matter removed to the United States District Court for the District of Minnesota. Following petitioner's voluntary dismissal of the Omaha Bank for procedural reasons

Minnesota with an interest rate of 12 percent per annum and in apparent compliance with Minn. St. §48.185 (Add. 2). Through their counsel, the Omaha Bank and respondent have stated that it is their intention "to charge Nebraska rates as soon as the courts have indicated that it may do so." (Add. 6).

(App. 25), the United States District Court remanded the matter back to the state court for lack of federal removal jurisdiction (App. 49). 422 F. Supp. 1346 (D. Minn. 1976). Thereafter, petitioner brought a motion for partial summary judgment before the Hennepin County (Minnesota) District Court ("the District Court") to have the Omaha BankAmericard [VISA] program declared in violation of Minn. St. §48.185, and, to permanently enjoin respondent from engaging in any activity in connection with the offering or operation of said credit card program in further violation of the statute (App. 89). In defense to this motion, respondent raised the federal question presented herein, *i.e.* whether the National Bank Act, 12 U.S.C. §85, preempts Minn. St. §48.185 and enforcement of the provisions of such statute against the Omaha BankAmericard [VISA] program. Upon being notified of this constitutional challenge to Minn. St. §48.185, the Attorney General for the State of Minnesota intervened as a party plaintiff and joined in petitioner's prayer for a declaratory judgment and permanent injunction (App. 81).

Section 85 of the National Bank Act (12 U.S.C. §85) provides in pertinent part:

"Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." (Add. 1).

Respondent argued that this section gives a national bank, located in Nebraska but doing business in Minnesota, the

right to charge in Minnesota the highest rate of interest permitted by the laws of the State of Nebraska; and, that 12 U.S.C. §85 preempts that portion of Minn. St. §48.185 which makes Minnesota bank credit card interest rates applicable to foreign banks, including national banks, doing business in the State of Minnesota.<sup>4</sup>

The District Court rejected the above argument of federal preemption and entered partial summary judgment in behalf of petitioner and against respondent on February 18, 1977. The District Court held, among other things, that (1) nothing in 12 U.S.C. §85 preempts the application and enforcement of Minn. St. §48.185 against respondent and the Omaha BankAmericard [VISA] program; (2) the Omaha BankAmericard [VISA] program was in violation of Minn. St. §48.185 as long as it provided for the collection of interest in excess of

<sup>4</sup> That portion of Minn. St. §48.185 which makes Minnesota bank credit card interest rates applicable to foreign banks doing business in Minnesota provides as follows:

Subd. 6. *This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:*

- (a) that the law of another state shall apply;
- (b) that the person consents to the jurisdiction of another state; and
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is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction. (Emphasis added.) (Add. 2).



1 percent per month (12 percent annual rate); and (3) respondent is permanently enjoined from engaging in bank credit card activities in the State of Minnesota in violation of Minn. St. §48.185 (App. 123).<sup>5</sup>

The District Court in rejecting respondent's argument that 12 U.S.C. §85 preempted Minn. St. §48.185 and the operation thereof, stated:

"Since the founding of our republic, Congress, by its legislation, has allowed states to set their own interest rates. By their position in this case, the defendants are arguing that they have a right to export Nebraska's high interest rate into the State of Minnesota. This court, in its Order of December 22, 1976, said:

'To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial custom of so long a standing in our Republic.' (App. 134).

On appeal to the Minnesota Supreme Court, respondent again argued that 12 U.S.C. §85 preempted the application of Minn. St. §48.185 to the Omaha BankAmericard [VISA] program. In an opinion filed on November 10, 1977 (App. 154), the Minnesota Supreme Court reversed the District Court decision on the basis of federal preemption of Minn. St. §48.185 by Section 85 of the National Bank Act (Add. 1). The Minnesota Supreme Court did not find any dis-

<sup>5</sup> As previously stated in footnote 2, *infra*, petitioner's claims for damages and attorneys' fees against respondent remain for consideration by the District Court following this appeal.

harmony between Minn. St. §48.185 and the objectives of Congress in enacting §85 of the National Bank Act. To the contrary, the Court conceded that its decision to permit the Omaha BankAmericard program to collect 18 percent interest in violation of Minn. St. §48.185 would result in an advantage to out-of-state national banks which is inconsistent with the purposes of the National Bank Act:

"Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, *an advantage which appears to be contrary to the original purpose in adopting this particular section [85] of the National Bank Act.*" (Emphasis added.) (App. 168).

\* \* \*

"A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. *The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.*" (Emphasis added.) (App. 168).

The Minnesota Supreme Court's refusal to enforce Minn. St. §48.185 against the Omaha BankAmericard [VISA] program was *not* out of a belief that the state statute was an obstacle to the purposes of §85 of the National Bank Act. Rather, the Minnesota Supreme Court was reluctant to reach a result which it thought would be inconsistent with two United States Court of Appeals' decisions involving the op-



eration of bank credit card programs in the State of Iowa by out-of-state national banks. See, *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977) and *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The Minnesota Supreme Court gave the following explanation for its decision:

"Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher." (App. 165).

\* \* \*

"In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 U.S.C. §85 precludes states from discriminating against lenders as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. *If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.*" (Emphasis added.) (App. 165).

In view of the *Fisher* cases, *supra*, the Minnesota Supreme Court reversed the District Court, held that 12 U.S.C. §85

preempted Minn. St. §48.185 and that based on §85, a national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Three justices of the Minnesota Supreme Court entered dissents to the majority opinion (App. 169). Justice Scott, writing for the minority, stated:

"I respectfully dissent. The original purpose of 12 U.S.C.A., §85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was intended to put 'national banks on a equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders.' *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 880 (8th Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The *Fisher* decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act." (App. 169).

On December 8, 1977, the Minnesota Supreme Court denied a petition for rehearing but granted petitioner a stay of judgment pending this application for writ of certiorari (App. 197). Judgment was entered on December 14, 1977 (App. 198). The petition for writ of certiorari was filed on March 13, 1978 (89 days following entry of judgment), and was granted on May 22, 1978.

### SUMMARY OF ARGUMENT

The decision of the Minnesota Supreme Court that §85 of the National Bank Act preempts Minn. St. §48.185, regulating the interest rates which state and national banks, wherever located, may charge when engaging in bank credit card transactions with Minnesota citizens in the State of Minnesota is contrary to the doctrine of maintenance of competitive equality between state banks and national banks adopted by Congress in enacting §85 of the National Bank Act, conflicts with the legislative history of §85 of the National Bank Act, and ignores the plain meaning of the language found in §85 of the National Bank Act. Section 85 of the National Bank Act grants to each state the right to regulate interest rates which may be charged its residents by state and national banks doing business in such state. Minn. St. §48.185, which sets such interest rates, is not preempted by §85 of the National Bank Act, does not conflict with or frustrate the purposes of the National Bank Act, and enforcement thereof against respondent will not impose an undue burden on the performance or efficiency of national banks.

### I

The first clause of 12 U.S.C. §85 provides:

"Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the state . . . where the bank is located . . . and no more . . . ." (Add. 1).

This portion of §85 permits a national bank *located* in a state to charge on loans *made* in such state the rate permitted to *general lenders* under the general usury laws of the state.

The second clause of 12 U.S.C. §85 provides:

". . . except that where by the laws of any state a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this chapter." (Add. 2).

This clause permits a national bank *located* in a state to charge on loans *made* in that state the highest rate permitted to state banks in such state.

Congress in adopting the foregoing language of §85 sought to maintain competitive equality between state and national banks in the charging of interest rates. This Congressional policy was first confirmed by the United States Supreme Court in *Tiffany v. Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873), when this Court held that a national bank in Missouri could charge up to 10 percent per annum, the rate of interest permitted general lenders under the laws of the State of Missouri, and was not restricted to the lesser rate of 8 percent allowed state banks under Missouri law.

Section 85, however, was aimed at intrastate competition, *i.e.* between national banks located in the state and other local banks *in that state*:

"The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed by the laws of the state or territory where it is located; and equality is carefully secured with local banks." (Emphasis added.) *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555 (1900).

This same emphasis on intrastate competitive equality between national banks and other local banks is seen in the other leading cases cited under §85. See, e.g., *First National Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975); *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972); *Hiatt v. San Francisco National Bank*, 361 F.2d 504 (9th Cir. 1966). Section 85 says nothing which could reasonably be construed as providing a rule as to what interest rate may be charged by national banks in the context of interstate transactions. The federal statute is simply silent on the issue.

## II

There is nothing in the legislative history of the National Bank Act to indicate that §85, enacted over 100 years ago, was intended in any way to cover the situation of the interstate transactions present here where a national bank established in Nebraska is competing with banks and lenders in Minnesota. Indeed, Congress in enacting §85 of the National Bank Act did not contemplate that national banks would do business in states other than the state in which they were located or chartered. Section 11 of the Currency Act of 1863 (the forerunner of the National Bank Act of 1864) required that a national banking association must conduct its "usual business . . . in banking offices located at the places specified . . . in its certificate of association, and not elsewhere." Act of Febru-

ary 25, 1863, Ch. 58, §11, 12 Stat. 668 (1863). National banks at the time of adoption of the National Bank Act of 1864 were, therefore, confined to transacting their general or usual business in the city, town, or village in the State, Territory or District specified in their organizational certificates.

In order to ascertain the intent of Congress in adopting §85 of the National Bank Act, the Senate debates on §30 of the National Bank Act of 1864 (now §85) are revealing. See, *Congressional Globe*, 38th Congress, 1st Sess., 2123-2127 (1864). One group of senators, led by Senator Grimes of Iowa, desired to prevent national banks from charging higher interest rates than state banks and thereby gaining a major competitive advantage. Another group of senators, led by Senator Sherman of Ohio, asserted that national banks should be allowed to charge that interest rate which any individual or other institution in the state was allowed to charge, without regard to any limitation which might be placed on state banks. The Sherman group was intent on making it impossible for states to pass legislation hostile to national banks in the area of interest rates. The issue was finally settled by the compromise version of §30 of the 1864 Act (now §85) which emerged permitting national banks to charge the highest rate of interest permitted general lenders in the state where the national bank was located and also allowing national banks to charge the highest rate allowed state banks in such state if that rate was higher.

It is apparent, however, from examining the various draft changes in the statute and the report of the debate in the *Congressional Globe* that none of the senators contemplated that national banks would open offices in other states or transact business across state lines on an interstate basis. Hence, the legislative history of §85 of the National Bank Act reveals a total lack of consideration of what interest rates are to be



charged in the context of interstate transactions by national banks.

### III

The plain language of Section 85 supports the conclusion that §85 is silent on the issue of what interest rates may be charged by a national bank when it crosses state lines. The first clause of §85 must be read to refer to the interest rate which may be charged by a national bank on loans *made* where the bank is *located* and would allow a national bank to charge the highest interest rate allowed to general lenders by the laws of the state in which the national bank is "located." The word "located" used in §85 when read in conjunction with the word "established" used in 12 U.S.C. §81 means the state where the national bank is chartered and transacts its general banking business. The second clause of §85 permits a national banking association "organized" or "existing" in any state to charge the highest rate permitted state banks in such state, if the rate for state banks is higher than the interest rate allowed general lenders in such state. Neither clause or any other clause in §85 of the National Bank Act addresses the issue of what interest rate is permitted of national banking associations "located", "organized", or "existing" in one state and doing business in a second state. The use of such words as "located", "organized", and "existing" in §85 all appear to have reference to the same thing, that is, the state where the national bank was chartered and has its general place of business.

### IV

The majority of the Minnesota Supreme Court failed to perceive that the instant case is one of first impression and involves considerations entirely different than those addressed

by the Eighth and Seventh Circuits in the *Fisher* cases. What is at stake in the instant case is the determination of whether §85 of the National Bank Act is to be construed as permitting competitive inequality between national banks established in different states but conducting business in the same state. It also involves a determination of whether §85 of the National Bank Act preempts the state from enacting nondiscriminatory legislation applicable to *all* banks operating bank credit card programs within its borders. Because of its reliance on the *Fisher* cases, the Minnesota Supreme Court reached a result herein which is contrary to its own view of the purposes of the National Bank Act. Its decision was based not upon the merits of the issues presented nor upon the federal preemption standards established by this Court, but upon a misguided notion of how the Eighth Circuit Court of Appeals would have decided the matter.

The appellate courts in the *Fisher* cases sought to justify their decisions on the theory that the "most favored lender" doctrine announced in *Tiffany v. National Bank of Missouri*, *supra*, should be expanded to *interstate transactions* so as to give national banks the privilege of selecting between the highest rate of interest permitted by the state in which it has its principal place of business, or, the highest rate of interest permitted by the state in which the bank transacts business. This construction of §85 completely ignores the doctrine of maintenance of competitive equality between state and national banks with respect to interest rates which Congress sought to effect in enacting §85.

The Minnesota Supreme Court decision, if allowed to stand, would permit respondent, and its principal, the Omaha Bank, to operate a BankAmericard [VISA] program in Minnesota at an 18 percent interest rate per annum, while Minnesota

state banks, and national banks located in Minnesota, are limited to an annual interest rate of 12 percent. Respondent can operate profitably at 18 percent without the need to impose a membership fee. Minnesota state banks and national banks located in Minnesota are limited to imposing an annual interest rate of 12 percent plus a \$15 annual membership fee. National banks located outside of the State of Minnesota by offering their bank credit card "free" (without a membership fee of \$15 per annum) have a substantial, illegal competitive advantage over petitioner and all other state and local national banks operating bank credit card programs in this state.

To construe §85 of the National Bank Act so as to find in the plain language of that Act a rule that national banks located in a high-interest-rate state may, by virtue of the National Bank Act, export such rates to a low-interest-rate state completely ignores the policy of "competitive equality" between national and state banks as to interest rates which Congress so carefully built into §85 of the Act.

The construction given by the Minnesota Supreme Court of §85 of the National Bank Act not only creates competitive inequality between national banks in other states with higher interest rates and state banks located in a low-interest-rate state, but it also results in creating competitive inequality between national banks located in a high-interest-rate state and national banks located in a low-interest rate state.

## V

Section 85 fails to provide a rule as to what interest rates may be charged by national banks in *interstate* transactions. Absent a reference in §85 to the rate of interest which a national bank may charge on loans made in a state other than the state where it is located, standard conflict of laws rules govern. The Minnesota legislature, in enacting Minn. St.

§48.185 (Add. 2), has in effect determined that, as a fundamental policy of the State of Minnesota, banks (whether state, national or savings banks) operating bank credit card programs in the State of Minnesota and extending credit to Minnesota residents are to be limited to a rate of 12 percent per annum imposed on the average daily balance of the cardholder's account and a membership fee of \$15. Minn. St. §48.185, Subd. 6, expressly provides that the Minnesota statute, including its rate provisions, shall govern bank credit card transactions between a bank and persons who are residents of the State of Minnesota, if the bank induces such persons to enter into such arrangements by continuous systematic solicitation either personally or by an agent or by mail, retail merchants and banks within the State of Minnesota are contractually bound to honor credit cards issued by the bank, and the goods, services and loans are delivered or furnished in the State of Minnesota and payment is made from the State of Minnesota. The District Court, based on a Stipulation of Facts (App. 91), determined that Minn. St. §48.185 was applicable to the Omaha BankAmericard [VISA] program in Minnesota and that respondent must be enjoined from conducting or participating in any bank credit card operations in the State of Minnesota in violation of the statute.

This Court should reverse the Minnesota Supreme Court and order the decision of the District Court to be reinstated. Application of Minn. St. §48.185 to the Omaha BankAmericard [VISA] program does not conflict with or frustrate the policies of the National Bank Act and enforcement thereof will not impose an undue burden on the performance or efficiency of national banks. Similar regulation of interest rates charged in interstate credit transactions has been constitutionally up-

held in the context of non-back credit card programs. *See, Aldens, Inc. v. Packel*, 524 F. 2d 38 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). Minn. St. §48.185 operates in a nondiscriminatory way in setting the rate of interest which may be charged by in-state or out-of-state banks in the operation of credit card programs in the State of Minnesota. On the same rationale applied in *Aldens*, the Minnesota Bank Credit Card Act ought to be sustained as a valid exercise of state regulation. The Minnesota Bank Credit Card Act does not in any way attempt to preclude out-of-state national banks from introducing their credit card programs into the State of Minnesota. Rather, the state statute merely requires that, when operating in the State of Minnesota, out-of-state national banks abide by the same credit card interest rate schedule required of national banks located in the State of Minnesota.

## VI

Under 28 U.S.C. §2101(c), the period of time allowed for filing a writ of certiorari is 90 days from entry of judgment. The judgment of the Minnesota Supreme Court became final on December 14, 1977, when judgment was entered in this matter. It is from that date that the 90 days must be counted, and the petition for writ of certiorari filed by Marquette on March 13, 1978, with the United States Supreme Court was timely filed. *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924).

## ARGUMENT

### I. NATIONAL BANKS ARE SUBJECT TO STATE LAWS UNLESS SUCH LAWS ARE IN CONFLICT WITH OR FRUSTRATE THE PURPOSES OF THE NATIONAL BANK ACT, OR IMPOSE AN UNDUE BURDEN ON THE PERFORMANCE OR EFFICIENCY OF NATIONAL BANKS.

While recognizing that by their very nature national banks are creatures of federal law, this Court has stressed on numerous occasions that national banks are also subject to state legislation except where such legislation:

"expressly conflict[s] with the laws of the United States or frustrate[s] the purpose for which the national banks were created, or impair[s] their efficiency to discharge the duties imposed upon them by the law of the United States."

*McClellan v. Chipman*, 164 U.S. 347, 357 (1896). *Accord, Waite v. Dowley*, 94 U.S. 527, 533 (1876); *First National Bank v. Missouri*, 263 U.S. 640, 656 (1924); *Lewis v. Fidelity Co.*, 292 U.S. 559, 566 (1934); *Anderson National Bank v. Lockett*, 321 U.S. 233, 248 (1944).

If Congress has clearly indicated an intent to legislate exactly the same subject matter addressed by the particular state law in issue, such state law must yield to the paramount authority of the federal statute. *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283-84 (1896). *See also, Bank of California v. Richardson*, 248 U.S. 476, 483 (1919); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 559-61 (1963). Thus, those state laws affecting national banks which stand as an obstacle



to, or otherwise conflict with, the manifest intent and purpose of any provision of the National Bank Act are subordinate to the federal law. *Id.* However, the converse to the above rule is also true. That is, in the absence of some showing that the challenged state statute is contrary to Congressional intent and purpose underlying the National Bank Act, national banks are subject to such state legislation. *Lewis v. Fidelity & Deposit Co.*, *supra*, 292 U.S. at 566. See also, *First National Bank v. Kentucky*, 9 Wall. 353, 362-63 (1870); *McClellan v. Chipman*, *supra*, 164 U.S. at 358-59.

In the area of rates of interest permitted to be charged by national banks, there is no question that, in enacting what is now Section 85 of the National Bank Act (12 U.S.C. §85), Congress established the exclusive standard for determining the rate of interest permitted to be charged by national banks in competition with state banks in the state where the national bank is located. See, *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 411-13 (1873); *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555 (1900). Likewise, there is no dispute that, in enacting what is now Section 86 of the National Bank Act (12 U.S.C. §86), Congress has preempted the subject matter of penalties which may be assessed against a national bank for collecting interest at a usurious rate. See, *Farmers' & Mechanics' National Bank v. Dearing*, 91 U.S. 29, 35 (1875); *Hazeltine v. Central National Bank*, 183 U.S. 132, 137 (1901).

At issue in this appeal is whether Congress has preempted state legislation as to the rate of interest permitted to be charged by a national bank in states other than the state where its offices are located. It is a matter of first impression before this Court and, in the context of the Court's prior decisions, involves an analysis of (1) the Congressional purpose and in-

tent underlying 12 U.S.C. §85 and whether Minn. St. §48.185 is in conflict with or frustrates such purpose and intent; and (2) whether the enforcement of Minn. St. §48.185 will impose an undue burden on the performance or efficiency of national banks.

## II. THE STATE OF MINNESOTA'S REGULATION OF INTEREST RATES IMPOSED BY OUT-OF-STATE NATIONAL BANKS ON MINNESOTA CONSUMERS DOES NOT CONFLICT WITH THE CONGRESSIONAL INTENT UNDERLYING SECTION 85 OF THE NATIONAL BANK ACT.

### A. Congressional Purpose in Adoption of the National Bank Act was to Maintain Competitive Equality Between National and State Banks.

The first clause of 12 U.S.C. §85 provides:

"Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more . . ." (Add. 1).

This portion of §85 permits a national bank *located* in a state to charge on loans *made* in such state the rate permitted to *general lenders* under the general usury laws of the state.

The second clause of 12 U.S.C. §85 provides:

". . . except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." (Add. 2).

This clause permits a national bank *located* in a state to charge on loans *made* in that state the highest rate permitted to *state banks* in such state.

The legislative history of §85 reveals that it was designed to insure competitive equality between state and national banks in the charging of interest. *See, Congressional Globe*, 38th Cong., 1st Sess., pp. 2123-27 (1864). This Congressional intent was first confirmed in *Tiffany v. Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873). The case arose out of a claim of usury asserted by a debtor against a national bank located in Missouri. Under what is now §85 of the National Bank Act, the plaintiff sought to recover from the defendant national bank twice the amount of interest paid on what plaintiff claimed to be a usurious loan. Missouri law permitted general lenders in the State of Missouri to loan money at 10 percent per annum, but restricted Missouri state banks to charging interest at the rate of 8 percent per annum. Plaintiff contended that national banks under §85 of the National Bank Act were restricted to the same rate permitted Missouri state banks and could not charge the higher 10 percent rate permitted general lenders. This Court, in construing what is now 12 U.S.C. §85 (formerly Section 30 of the 1864 Act<sup>6</sup>) stated:

"The act of Congress is an enabling statute, not a restraining one, except so far as it fixes a maximum rate in all cases where State banks of issue are not allowed a greater. There are three provisions in section thirty, each of them enabling. If no rate of interest is defined by State laws, 7 percent is allowed to be charged. If there is a rate of interest fixed by State laws generally, the banks are allowed to charge that rate but no more; except that if

<sup>6</sup> Act of June 3, 1864, Ch. 106, Section 30, 13 Stat. 108 (1864).

State banks of issue are allowed to reserve more, the same privilege is allowed to National banking associations." *Id.* at 411.

On this basis, the Court held that the national bank in Missouri could charge up to 10 percent per annum, the rate of interest permitted general lenders and was not restricted to the lesser rate of 8 percent allowed state banks under Missouri laws.

In *Tiffany*, this Court was careful to point out that it was the intent of Congress to insure to national banks equal competitive opportunity with state banks in terms of interest rates charged:

"It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that *it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition.* In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same." (Emphasis added.) *Id.* at 412.

Thus, in adopting §85 of the National Bank Act, Congress sought to preserve and equalize competition between national and state banks.<sup>7</sup>

Section 85, however, was aimed at *intrastate* competition, *i.e.*, between national banks located in a state and the other local banks in *that* state:

"The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed by the laws of the state or territory where it is located; and *equality* is carefully secured with *local banks*." (Emphasis added.)

\* \* \*

"\* \* \* The intention of the national law is to adopt the state law and permit to national banks what the state law allows to its citizens and to the banks organized by it." (Emphasis added.) *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555 (1900).

This same emphasis on *intrastate* competitive equality between national banks and other local banks is also seen in leading lower court cases cited under §85. *See, e.g., First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 880 (8th Cir. 1975); *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F. 2d 855, 861-64 (6th Cir. 1972); *Hiatt v. San*

<sup>7</sup> This theme of competitive equalization is found in other parts of the National Bank Act. As the United States Supreme Court pointed out in *Lewis v. Fidelity & Deposit Co.*, *supra*, in discussing taxation of national banks: "The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation." 292 U.S. at 564-65. Furthermore, the court said, this general policy of equalization appears in both original and later provisions and amendments of the Act, as well as related acts, dealing with branching capabilities, exercise of fiduciary powers, interest on deposits, capitalization requirements and powers to loan on mortgage. 292 U.S. at 564-65.

*Francisco National Bank*, 361 F. 2d 504, 506-507 (9th Cir. 1966). These cases respectively define the purpose of §85 as follows:

"Considering the federal statute in its entirety, we clearly see a Congressional intent that *the competitive opportunities of a national bank operating in a certain state should not be impeded by Congressional limitations on interest charges which are more restrictive than state limitations imposed upon the state's banks*." (Emphasis added.) *Hiatt v. San Francisco National Bank*, *supra*.

\* \* \*

"The conclusion is inescapable that the National Bank Act accorded national banks *the right to charge the interest rate afforded their state competitors whether the competitor was a state bank or other non-bank lender*." (Emphasis added.) *Northway Lanes v. Hackley Union National Bank & Trust Co.*, *supra*, at 864.

\* \* \*

"The Act reflects a Congressional compromise giving national banks full and complete parity of interest rate regulation with state banks while guarding against unfriendly antifederal state legislation or ruinous competition with state banks. \* \* \* The policy of the pro-national bank faction in Congress in fashioning the Act was to place national banks in a position of limited advantage over state banks by *allowing them to charge interest at the highest rate applicable under state law to lenders generally in each respective state, not necessarily at the rate applicable to state banks which might be lower*." (Emphasis added.) *First National Bank of Mena v. Nowlin*, *supra*, at 879.

\* \* \*



"The policy of competitive state-federal equality in the context of usury regulation is supported by the District Court's construction of Section 85 which imposes the same interest ceiling on national banks as the most favored lenders in the state, and thereby puts national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders." (Emphasis added.) *Id.* at 880.

As all of the above quotations clearly indicate, the key consideration of §85 is one of providing "competitive equality" in the context of intrastate competition between national banks and other lending institutions in the same state. Section 85 itself says nothing that could reasonably be construed as providing a rule as to what interest rate may be charged in the context of interstate transactions. The federal statute is simply silent on issue.

**B. Interstate Transactions by National Banks Were Not Contemplated in the Currency Act of 1863 or National Bank Act of 1864.**

The forerunner of §30 (now §85) of the National Bank Act was §46 of the Currency Act of 1863. It read in relevant part as follows:

"That every association may take, reserve, receive and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, such rate of interest or discount as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws

of the several States in which the associations are respectively located and no more." (Emphasis added.) Act of February 25, 1863, Ch. 58, §46, 12 Stat. 678-79 (1863).

Section 46 of the Currency Act of 1863 provided, in effect, that national banks located in a particular state could charge the rate of interest established by the laws of the state in which such national bank was located for general lenders of the state (legal rate); however, national banks were prohibited from taking advantage of the laws of the state in which such national banks were located allowing general lenders to enter into contracts with parties calling for interest at a higher rate (contract rate) than that allowed general lenders of the state absent such a contract.

There was no provision in §46 of the Currency Act of 1863 for the interest rate to be charged by a national bank when it transacted business outside of the state where it was located or chartered. Indeed, Congress did not contemplate that national banks would do business in states other than the state in which they were located or chartered. Section 11 of the Currency Act of 1863 required that a national banking association must conduct its "usual business . . . in banking offices located at the places specified . . . in its certificate of association, and not elsewhere." Act of February 25, 1863, Ch. 58, §11, 12 Stat. 668 (1863). National banks in 1863 were therefore confined to transacting their general or usual business in the city, town or village in the State or Territory or District specified in their organizational certificate. Act of February 25, 1863, Ch. 58, §6, 12 Stat. 666 (1863).

In 1864, Congress enacted the National Bank Act of 1864. The first draft of §30 of the 1864 Act provided for a uniform rate of interest to be charged by national banks, as follows:

"Every association may take . . . interest at a rate not exceeding seven percent per annum . . ." Congressional Globe, 38 Cong., 1st Sess. 2123 (1864).

However, when §30 came up for debate in the Senate on May 5, 1864, the Senate Committee on Finance immediately recommended the following amendment.

"That every association may take . . . interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more. And when no rate is fixed by the laws of the State or Territory, the bank may take a rate not exceeding seven percent." Congressional Globe, 38th Congress, 1st Sess. 2123 (1864).

This version would have allowed national banks located in a state to charge the legal rate of interest or the contract rate of interest, whichever was higher. If the state or territory fixed no specific rate of interest, a national bank was to be limited to charging a rate not exceeding 7 percent per annum.

The final version of §30, as approved by the House and Senate in 1864 was:

*"That every association may take, reserve, receive and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this Act. \* \* \*"* Act of June 3, 1864, Ch. 106, §30, 13 Stat. 108 (1864). (Emphasis added.)

In order to ascertain the intent of Congress in adopting this final version of §30, more than 100 years ago, the Senate debates on Section 30 reflected in the Congressional Globe are revealing. One group of senators, led by Senator Grimes of Iowa and including Senators Henderson of Missouri and Doolittle of Wisconsin, desired to prevent national banks from charging higher interest rates than state banks and thereby gaining a major competitive advantage. See, *Congressional Globe*, 38th Congress, 1st Sess., at 2123-2127 (1864). Another group of senators, led by Senator Sherman of Ohio and including Senators Fessenden of Maine and Trumbull of Illinois, asserted that national banks should be allowed to charge that interest rate which any individual or other institution in the state was allowed to charge, without regard to any limitation which might be placed on state banks.<sup>8</sup> The Sherman group was intent on making it impossible for states to pass legislation hostile to national banks in the area of interest rates. They feared that states might pass a "general rate" applicable to national banks and then allow state banks to be exempted therefrom.<sup>9</sup> The issue was settled by the compromise version of Section 30 that finally emerged which permitted national banks to charge the highest rate of interest permitted general lenders in the state (legal or contract rate) where the national bank was located and also allowed national banks to charge the highest rate allowed state banks in such state if that rate was higher.

It is apparent from examining the various draft changes in the statute and the report of the debate in the Congressional Globe that none of the senators, from either faction, con-

<sup>8</sup> See, Comment, *National and State Bank Interest Rates Under the National Bank Act: Preference or Parity*, 58 Iowa Law Review 1250-1267 (1973) at 1254.

<sup>9</sup> *Id.* at 1254-1255.

templated that national banks would open offices in other states or transact business across state lines on an interstate basis. State banks were limited to *intrastate* transactions and Congress, in the Currency Act of 1863, had restricted national banks to conducting their general banking business at the place specified in their organizational certificate.<sup>10</sup> Hence, the legislative history which emerged from §30 of the National Bank Act of 1864 is also silent on the question of what interest rates are to be charged in the context of interstate transactions by national banks.

**C. The "Plain Meaning" of §85 of the National Bank Act Suggests that Congress did not by §85 Intend to Adopt a Rule on Interest Rates for National Banks in Interstate Transactions.**

The current version of §85 is practically identical with §30 of the 1864 Act. Section 85 presently reads:

"Any association may take, receive, reserve, and charge on *any* loan or discount *made*, or upon any notes, bills of exchange or other evidences of debt, interest at the rate allowed by laws of the State, Territory, or District *where the bank is located* \* \* \* and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for *associations organized or existing in any such State* under this chapter." (Emphasis added.)

In construing the first clause of §85, consideration must be given to the legislative policy of maintenance of competitive

<sup>10</sup> For a general history of the right of state banks and national banks to operate more than one office and engage in branch bank activities, see, Fischer, *American Banking Structure* (1968), 8-72.

equality between national banks and state banks which Congress had in mind in adopting the National Bank Act of 1864 and establishing a dual banking system. If the first clause of §85 is construed to mean that the interest rate charged by a national bank on loans made by it in *any* state is limited to that rate which is permitted in the state where it is located, then that national bank, if it is located in a state with low interest rates, will be at a competitive disadvantage in making loans in a neighboring state with a higher rate permitted national banks and state banks in that state. It will not have the same profit opportunity. Banks enjoying higher interest rates can spend more for advertising, afford to give incentives (such as "free" credit cards), take greater credit risks, place more loans on the books than competing banks enjoying less favorable rates, and generally dominate the marketplace (this assumes that the interest rate differential is not so extreme as to drive consumers to the bank with the lowest interest rates). Similarly, if the national bank is located in a state which permits high interest rates, it will have a competitive advantage over national and state banks located in a neighboring state with a lower interest rate, when it makes loans in that neighboring state. Congress in adopting §85 of the National Bank Act could hardly have intended such a result.

The first clause of §85 must be read to refer to the interest rate which may be charged by a national bank on loans *made* where the bank is *located* and would allow a national bank to charge the highest interest rate allowed to general lenders by the laws of the state in which the national bank is "located." The word "located" used in §85 when read in conjunction with the word "established" used in 12 U.S.C. §81 means the state where the national bank is chartered and transacts its



general banking business. In this connection, §85 is similar to many other provisions of the National Bank Act which treat national banks as peculiarly local institutions. See, 12 U.S.C. §§30, 33, 34a, 36, 51, 62, 72, 81, 85, 86, and 94; *Cope v. Anderson*, 331 U.S. 461, 467 (1947); *Citizens & Southern National Bank v. Bougas*, — U.S. —, 98 S. Ct. 88 (1977).

Nor does the second clause of §85 address the issue of what interest rate is permitted of national banking associations "located", "organized", or "existing" in one state and doing business in a second state. The second clause of §85 permits a national banking association "organized" or "existing" in any state to charge the highest rate permitted state banks in such state, if the rate for state banks is higher than the interest rate allowed general lenders in such state. Use of such words as "located", "organized", and "existing" in §85 all appear to have reference to the same thing, that is, the state where the national bank was chartered and has its general place of business.<sup>11</sup>

<sup>11</sup> It must be noted that the United States Supreme Court in *Citizens & Southern National Bank v. Bougas*, *supra*, in construing the meaning of the word "located" as found in the National Bank Act venue provision, 12 U.S.C. §94, held that a national bank for venue purposes was "located" not only in the county of the national bank's principal place of business but also in any county in which a national bank conducts business at a branch. Assuming the words "located" and "existing" as found in §85 of the National Bank Act mean essentially the same thing, even if those words are to be given an expanded reading so as to mean the place where the national bank has its principal place of business or the place where the national bank conducts any significant business, §85 cannot be read to permit a national bank to export the interest rates of the state where it has its principal place of business (home state) across state lines to a foreign state when it engages in interstate transactions. Under an expanded reading of the words "located" or "existing", a national bank engaged in intrastate transactions would be deemed "located" or "existing" in its home state under §85 and the national bank would refer to the laws of such state for purposes of determining what interest rates may be charged. A national bank engaged in

Hence, the plain language of §85 supports the conclusion that §85 is silent on the issue of what interest rates may be charged by a national bank when it crosses state lines.

#### D. Lower Court Decisions Concerning Permissible Interest Rates in Interstate Transactions by National Banks.

Other than the Minnesota Supreme Court's decision herein, the only reported cases to reach the conflict of laws issue in the context of interstate credit transactions by national banks are: *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969); and, the two *Fisher* cases, *Fisher v. The First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) and *Fisher v. The First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977).

In the first case to address this issue, the *Meadow Brook* case, the plaintiff national bank, established in the State of New York, brought suit on a promissory note securing a mortgage loan made by plaintiff in the State of Louisiana. One of the defenses asserted by the defendants was that the promissory note was usurious under Louisiana law. The bank argued, however, that, because it was established in the State of New York, §85 of the National Bank Act required the court to look to New York law to determine the maximum interest rate which the plaintiff national bank could charge.

The United States District Court for the Eastern District of Louisiana rejected the bank's argument on the basis that

interstate transactions would be deemed "located" or "existing" in the foreign state under §85 if it conducts significant business there, and the national bank would refer to the laws of that state for purposes of determining what interest rates may be charged. The results then are the same in terms of whose state laws one looks to, whether one gives the words "located" and "existing" a narrow or broad interpretation under §85.

the federal statute was silent as to conflict of laws in interstate transactions:

"We hold that 12 U.S.C. §85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; *it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state.*" (Emphasis added.) 302 F. Supp. at 75.

Having concluded that §85 does not address itself to the question of usury with respect to out-of-state loans, the court ruled that Louisiana law governed:

"[The National Bank Act] fixes the maximum rate of interest to be charged by national banks on loans made in the state where they are located by reference to the law of that state, the purpose being to establish equality with state banks as to the interest rates. *Consequently, loans made in states other than the one where the bank is located ought to be governed by the laws of the state where the loan is made. This establishes equality with state banks in those states as to the interest rates.*" (Emphasis added.) *Id.* at 75.

This brings us to the *Fisher* cases so heavily relied upon by the respondent. The *Fisher* cases involved an Iowa resident who commenced two separate class action suits, one against the First National Bank of Chicago and the other against the First National Bank of Omaha, for alleged antitrust and civil right violations, and statutory damages (under 12 U.S.C. §86) of twice the amount of interest paid by cardholders in Iowa, in connection with BankAmericard programs operated by the two banks in the State of Iowa. At the trial court level,

judgment was entered against Fisher in both cases on grounds unrelated to federal preemption.<sup>12</sup> On appeal, the Seventh and Eighth Circuits cited various reasons for affirming the respective lower court decisions, including the fact that the interest charged by the two banks was within the permissible rates of the State of Iowa as well as the national banks' home states of Illinois and Nebraska. *See*, 538 F. 2d at 1290 and 548 F. 2d at 258. In addition, both appellate courts sought to justify their decisions on the theory that the "most favored lender" doctrine announced in *Tiffany v. National Bank of Missouri*, *supra*, should be expanded to interstate transactions so as to give national banks the privilege of selecting between the highest rate of interest permitted by the state in which it has its principal place of business, or, the highest rate of interest permitted by the state in which the bank transacts business. *See*, 538 F. 2d at 1291; 548 F. 2d at 257-58.

The *Fisher* cases are, in the first instance, distinguishable from the present case in that the respective courts in those cases found the interest rates charged by the subject bank credit card programs to be within the maximum rates of both the bank's home state and the transaction state. That is not the situation here.

Likewise, the courts in the *Fisher* cases were not dealing with a state statute specifically setting interest rates to be charged on all bank credit card programs operated in the state as a distinct class of loans. In regulations issued by the Comptroller of the Currency as to §85, it is provided that national banks may charge the highest rate of interest permitted "on a specified class of loans . . . subject only to the provisions

<sup>12</sup> *See*, *Fisher v. The First National Bank of Chicago*, No. 74C489 (N.D. Ill. 1975) (unreported), 538 F. 2d, *supra*, at 1287-88; *Fisher v. The First National Bank of Omaha*, No. 72-0-156 (D. Neb. 1975) (unreported), 548 F. 2d, *supra*, at 256-57.



of State law relating to such class of loans that are material to the determination of the interest rate." 12 C.R.F. §7.7310. As noted by the District Court in the instant case:

"\* \* \* [T]he plain meaning of regulation 7.7310 indicates that states are allowed to discriminate as to classes of loans because everyone in the state is forbidden to make the loan and the principle of parity is not violated. Here, the State of Minnesota has set up a class of loan and designated it as a credit card rate. No one in the state is allowed to issue credit at a more favorable rate; to allow First Bank of Omaha to charge a higher rate would violate the doctrine of parity." (App. 137).

More importantly, in relation to the present appeal, neither the Seventh nor the Eighth Circuit Court was faced in *Fisher* with the critical issue of whether to permit competitive inequality between national banks doing business in the same state. Accordingly, the *Fisher* cases cannot be viewed as authority for the proposition that §85 of the National Bank Act should be permitted to be utilized by a Nebraska-based national bank as a means of coming into the State of Minnesota and importing its home state's higher interest rates when Minnesota-based national banks are limited to the rate permitted by Minn. St. §48.185.

The majority of the Minnesota Supreme Court in relying on the *Fisher* cases failed to perceive that the instant case involves considerations entirely different than those addressed by the Eighth and Seventh Circuits in the *Fisher* cases. What is at stake in the instant case is a determination of whether §85 of the National Bank Act is to be construed as permitting competitive inequality between national banks established in different states but conducting business in the same state. It

also involves a determination of whether §85 of the National Bank Act preempts a state from enacting nondiscriminatory legislation applicable to *all* banks operating bank credit card programs within its borders.

Congress in enacting §85 of the National Bank Act sought to maintain competitive equality between national banks and state banks as to interest rates permitted to be charged by national banks. The Minnesota Supreme Court decision, if allowed to stand, would permit respondent, and its principal, the Omaha Bank, to operate a BankAmericard [VISA] program in Minnesota at an 18 percent interest rate while Minnesota state banks, and national banks located in Minnesota, are limited to an annual interest rate of 12 percent. Furthermore, by permitting national banks located outside of the State of Minnesota to charge an 18 percent rate of interest, such banks would have the competitive advantage of being in a better position to offer their bank credit card "free" (without a membership fee of \$15 per annum). Obviously, the *economic* ability to offer a "free" bank credit card gives a bank competitive advantage over banks which are economically unable to do so. If out-of-state national banks are given the power to charge their higher home-state interest rates in low-interest-rate states such as Minnesota, they will, therefore, be given a distinct competitive advantage over national banks located in such low-interest-rate states.

To construe §85 of the National Bank Act so as to find in the plain language of that Act a rule that national banks located in a high-interest-rate state may, by virtue of the National Bank Act, export such rates to a low-interest-rate state completely ignores the policy of "competitive equality" between national and state banks as to interest rates which Congress so carefully built into §85 of the Act. As the dissent in the Minnesota Supreme Court decision states:



"The Fisher decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act." (App. 169).

Even the majority opinion by the Minnesota Supreme Court recognized that its decision would afford "an advantage which appears to be contrary to the original purpose in adopting this particular section [85] of the National Bank Act" (App. 169) and "inconsistent" therewith (App. 169).

It is submitted, therefore, that the State of Minnesota's regulation of interest rates imposed by out-of-state national banks operating in Minnesota neither conflicts with the laws of the United States nor does it frustrate the purpose for which national banks were created. If anything, Minn. St. §48.185 fosters the Congressional intent of competitive equality underlying §85 of the National Bank Act. Accordingly, the only remaining consideration is whether Minn. St. §48.185 imposes an undue burden on the performance or efficiency of out-of-state national banks.

### III. MINNESOTA'S BANK CREDIT CARD ACT IS NOT AN UNDUE BURDEN ON OUT-OF-STATE NATIONAL BANKS.

Absent a reference in the National Bank Act, 12 U.S.C. §85, to the rate of interest which a national bank may charge on loans made in a state other than the state where it is located, what law governs the rate of interest chargeable by that national bank?

Normally, the parties to a loan transaction may, by agreement, choose the interest rate law of one state or the other to apply. The courts will recognize this contractual choice of laws unless the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties choice, or, unless application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. In this latter situation, the state with the more significant contacts with the transaction would be the state of the applicable law. *Restatement (Second) of Conflict of Laws*, §§203, 187 and 188.<sup>13</sup>

<sup>13</sup> Some commentators have suggested that when §85 of the National Bank Act says that a national bank is limited to the rate allowed by "the laws of the [jurisdiction] where the bank is located," this refers not only to the maximum rate established by the jurisdiction's usury law, but to the jurisdiction's choice-of-law rules. The "laws of the jurisdiction where the bank is located" includes not only statutory laws governing usury, but also common law, conflict-of-laws rules as to which usury statutes apply. See, Shanks, *Special Usury Problems Applicable to National Banks*, 87 The Banking Law Journal, 483-501 (1970); Note, *Fisher v. First National Bank of Chicago: 12 U.S.C. §85 is Granted Automatic Extraterritorial Effect*, 32 University of Miami Law Review, 239-254 (1977). If so, given the strong public policy enunciated in Minnesota Statutes, §48.185, calling for application of the Minnesota bank credit card interest rate statute to credit card transactions arising in Minnesota between Minnesota residents and

The Minnesota legislature, in enacting Minn. St. §48.185, has in effect determined that, as a fundamental policy of the State of Minnesota, banks (whether state, national or savings banks) operating bank credit card programs in the State of Minnesota and extending credit to Minnesota residents under such programs shall be limited in the amount and method of computing finance charges:

*"This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:*

- (a) that the law of another state shall apply;*
  - (b) that the person consents to the jurisdiction of another state; and*
  - (c) which fixes venue;*
- is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resi-*

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local or foreign banks, such statute would presumably be applied, whether the forum state was Minnesota or Nebraska. See, *Restatement (Second) of Conflict of Laws*, §§203, 187, 188; *Kinney Loan & Finance Co. v. Sumner*, 159 Neb. 57, 65 N.W. 2d 240 (1954); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W. 2d 408 (1973).

dent of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction." (Emphasis added.) Minn. St. §48.185, Subd. 6.

The District Court, as part of its Findings of Fact, Conclusions of Law and Order for Judgment, found that the Omaha Bank and respondent have or intend to engage in the systematic and continuous solicitation of Minnesota residents to induce them to open an Omaha BankAmericard [VISA] credit card account; that retail merchants and banks in Minnesota are or will become contractually bound to honor BankAmericard [VISA] credit cards issued by the Omaha Bank; that goods, services and loans are or will be delivered or furnished to Minnesota residents through use of such credit cards in this State, and that said Minnesota residents will pay for such goods and services or loans by remitting payments for same to the Omaha Bank. See, Paragraphs IV, V, VI, and VIII, Findings of Fact, Conclusions of Law, and Order for Judgment (App. 125). In view of such Findings of Fact, the District Court determined that Minn. St. §48.185 was applicable to the Omaha BankAmericard [VISA] program in Minnesota and that the respondent must be enjoined from conducting, or participating in, any bank credit card operations in the State of Minnesota in violation of the statute.

Similar regulation of interest rates charged in interstate credit card transactions has been constitutionally upheld in the context of non-bank credit card programs. See, *Aldens, Inc. v. Packel*, 524 F. 2d 38 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Aldens, Inc. v. LaFollette*, 552 F. 2d 745 (7th



Cir. 1977), *cert. denied*, — U.S. — (1977). The Third Circuit in the first *Aldens* case held that regulation by the Pennsylvania Goods and Services Installment Sales Act of the finance charges imposed by out-of-state companies on Pennsylvania residents does not violate the United States Constitution. A Chicago, Illinois, mail order house contended that Pennsylvania could not determine the maximum rate the mail order house could charge for credit purchases by Pennsylvania residents. However, the court found that Pennsylvania had a substantial interest in determining the maximum charges its residents had to pay and so there was no violation of constitutional due process. 524 F. 2d at 43-44.

The *Aldens* case is of particular significance herein due to the fact that, like Minn. St. §48.185, the Pennsylvania statute also has its own conflict of laws provision specifying Pennsylvania law to be controlling upon out-of-state sellers soliciting the business of Pennsylvania residents. The court found this conflict of laws provision to be constitutionally permissible not only as to due process but also under the commerce clause of the United States Constitution. It held that so long as the Pennsylvania statute operated in a nondiscriminatory way toward both in-state and out-of-state companies doing business in the state, it was a valid exercise of state regulation. *Id.* at 45-46. Likewise, the court indicated that in this age of usury laws and consumer credit statutes, it could not be said that the Pennsylvania regulation of finance charges put an undue burden on interstate commerce.

Similarly, Minn. St. §48.185 operates in a nondiscriminatory way in setting the rate of interest which may be charged by in-state and out-of-state banks (regardless of whether state or national banks) in the operation of credit card programs in the State of Minnesota. On the same rationale applied in

*Aldens* the Minnesota Bank Credit Card Act ought to be sustained as a valid exercise of state regulation. Moreover, the statute ought to be applied regardless of any purported agreement between the out-of-state bank and the Minnesota resident, pursuant to which the Minnesota resident agrees that the laws of the out-of-state bank may be applied. This is the only way to insure competitive equality between out-of-state lenders operating in Minnesota and in-state lenders, *i.e.* if both are required to abide by the same interest rate schedules.

Nor will the functions of the Omaha Bank, or any other national bank, be destroyed or unreasonably hampered by the enforcement of Minn. St. §48.185. In this regard, the recent entry by the Omaha Bank into the Minnesota market in apparent compliance with Minn. St. §48.185 (Add. 6) evidences that it has the administrative capability to operate the Omaha Bank-Americard [VISA] program at 12 percent in Minnesota while at 18 percent in Nebraska. Likewise, the Court may take judicial notice of the fact that other out-of-state national banks are operating in Minnesota at 12 percent while at the same time operating their programs in their home state and other states at higher rates of interest.

As this Court noted in *McClellan v. Chipman*, *supra*:

"Of course, in the broadest sense, any limitation by a State on the making of contracts is a restraint upon the power of a national bank within a state to make such contracts; but the question which we determine is whether it is such a regulation as violates the [National Bank Act] of Congress." 164 U.S. at 358.

The Minnesota Bank Credit Card Act does not in any way attempt to preclude out-of-state national banks from introducing their credit card programs into the State of Minnesota. Rather, the state statute merely requires that, when operating in the



State of Minnesota, out-of-state national banks abide by the same credit card interest rate schedule required of national banks located in the State of Minnesota. If an out-of-state national bank is to enjoy the opportunity to conduct business in the State of Minnesota, it should also be required to comply with the same nondiscriminatory laws to which national banks located in Minnesota are bound.<sup>14</sup>

#### IV. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

Pursuant to the direction of the Court, petitioner addresses the following argument to the matter of timeliness in filing the petition for writ of certiorari in Case No. 77-1265. This question is governed by the following provision of 28 U.S.C. §2101(c) (Add. 11):

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be taken or applied for within 90 days after the entry of such judgment or decree.* \* \* \*" (Emphasis added.)

While the Minnesota Supreme Court filed its opinion (App. 154) in this matter on November 10, 1977, the judgment of

<sup>14</sup> An analogous situation, where national banks are deemed to be controlled not only by the laws of the state where their principal office is located but also by the laws of the states where they do business, is in the exercise of trust powers. 12 U.S.C. §92a. In 1964, the Comptroller of the Currency ruled that:

"a national bank with fiduciary powers may exercise them in another state or county if the bank conforms to the laws of that jurisdiction." (Emphasis added.)

Ruling of Comptroller of the Currency, 1 National Banking Review 610 (1964); CCH Fed. Banking L. Rptr., ¶58,713.40. See also, the Regulations of the Comptroller of the Currency defining the fiduciary powers of national banks as those certain powers not in contravention with the local law of the state governing the fiduciary relationship. 12 C.F.R. §§9.1(d) and (h).

the Minnesota Supreme Court was not entered until December 14, 1977. It is from this latter date that the 90-day time limit of 28 U.S.C. §2101(c) begins to run. Accordingly, the Petition for Writ of Certiorari filed in Case No. 77-1265 on March 13, 1978 was timely by reason of being filed 89 days after entry of judgment by the Minnesota Supreme Court.

It should be noted that following the filing of the Minnesota Supreme Court opinion, this petitioner filed a petition for rehearing (App. 172) which automatically stayed entry of judgment. Minnesota Rules of Civil Appellate Procedure, Rule 140 (Add. 9). By Order dated December 8, 1977, the Minnesota Supreme Court denied said petition for rehearing (App. 197). On December 14, 1977, judgment of the Supreme Court of the State of Minnesota was entered (App. 198), pursuant to Rule 136.02 of the Minnesota Rules of Civil Appellate Procedure (Add. 9).

Relying principally upon *Citizens Bank of Michigan City v. Opperman*, 249 U.S. 448 (1919), respondent argued in its Brief in Opposition to the Petition for Writ of Certiorari herein that the decision of the Minnesota Supreme Court became "final" on December 8, 1977 with the filing of its order denying petition for rehearing. Admittedly, if the Minnesota Supreme Court's judgment has been entered *prior* to the petition for rehearing, it would make sense under 28 U.S.C. §2101(c) to compute the 90 days from the date of denial by the Minnesota Supreme Court of the petition for rehearing since, under such circumstances, there would have been no further act necessary to make the judgment final. However, the Minnesota Rules of Civil Appellate Procedure do not follow the practice adopted by the Federal Rules of Appellate Procedure and by some states in providing for entry of judgment prior to a petition for rehearing, and hence, *Citizens Bank of Michi-*

*gan City v. Opperman, supra*, and the other cases relied upon by respondent, are inapposite.

Rule 136.02 and Rule 140 of the Minnesota Rules of Civil Appellate Procedure (Add. 9) are substantially different from Rules 36 and 40(a) of the Federal Rules of Appellate Procedure (Add. 10). The Clerk of a federal Circuit Court of Appeals, under Rule 36, must prepare, sign and *enter* the judgment upon receipt of the opinion of the court and must mail on the date judgment is entered a copy of the opinion, if any, and notice of the date of entry of the judgment. Under Rule 40(a) of the Federal Rules of Appellate Procedure, a petition for rehearing must be filed within 14 days after *entry of judgment*. Minnesota Rules of Civil Appellate Procedure, Rules 136.02 and 140, provide that a petition for rehearing *stays entry of judgment* and judgment shall be entered only after the petition for rehearing is decided.

This Court made clear in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924) that where state law provides for entry of judgment only after the highest state court has decided a petition for rehearing, the time for filing a petition for writ of certiorari under 12 U.S.C. §2101(c) runs from the date of entry of the judgment.

The *Puget Sound* case involved the filing of a petition for writ of error to the Supreme Court of Washington. The petitioner had appealed a dismissal of his complaint by the trial court to the Supreme Court of Washington and the latter court heard the matter first in department and then *en banc*. The second department of the Supreme Court of Washington rendered its opinion on October 15, 1921. The case was then argued before the court *en banc*, which, in a per curiam opinion filed June 12, 1922, approved the decision of the second

department and affirmed the trial court judgment. On July 10, 1922, judgment of the Washington Supreme Court was entered in the minutes of the court. 264 U.S. at 23-24. In opposition to a petition for writ of error to this Court, it was argued that the time for computing the 90 days began to run from the filing of the Washington Supreme Court's *en banc* decision on June 12, 1922 (rather than from the date of judgment entered on July 10, 1922) and that the period for filing a writ of error thus expired on September 12, 1922.

The above argument was, however, rejected on the basis that, under the laws of the State of Washington, a decision of the department of the Supreme Court of Washington did not become final until 30 days after it was filed, during which time a petition for rehearing could be filed; that if no rehearing was asked for, or no order entered for a hearing *en banc* within the 30 days, the decision became final; that if a hearing *en banc* was ordered and had, the decision was final when filed; but that, in all cases when the decision became final, there was a specific provision that a judgment shall issue thereon. 264 U.S. at 24-25. Since the state statutory procedure contemplated the entry of judgment by the Supreme Court of Washington after the decision, this Court held that "however final the [*en banc*] decision may be, it is not the judgment." 264 U.S. at 25. Therefore, the time for appeal was determined to run from the date of entry of judgment rather than the date of the final decision.

In so holding, this Court in *Puget Sound* also answered the additional argument raised herein that, since the judgment of December 14, 1977 was entered by the Clerk of Court, it should be viewed as an insignificant ministerial act:

"It is said that the [entry of judgment] is a mere formal, ministerial entry of a clerical character, whereas the

real judgment is the final decision. Whatever the effect of the distinction in the procedure of the state, which counsel seeks to make, *we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress of September 6, 1916 [predecessor statute to 28 U.S.C. §2101(c)] fixing the time in which writs of error must be applied for and allowed.*" (Emphasis added.) 264 U.S. at 25.

Similarly, in the context of the instant case, there is no reason to doubt that that which the Minnesota Rules of Civil Appellate Procedure calls the judgment is the judgment referred to in 28 U.S.C. §2101(c). *See, e.g., Minnesota Rules of Civil Appellate Procedure, Rules 136.02, 137.01, 137.02 (Add. 9).*

## CONCLUSION

The decision of the Minnesota Supreme Court that §85 of the National Bank Act preempts Minn. St. §48.185 and prohibits the State of Minnesota from regulating interest rates charged Minnesota residents by out-of-state national banks engaged in bank credit card transactions in the State of Minnesota conflicts with the doctrine of maintenance of competitive equality between state and national banks adopted by Congress in enacting §85 and is contrary to the legislative history of §85 and the plain meaning of the Act. In view of the foregoing, and the fact that the petition was timely filed, this Court should reverse the decision of the Minnesota Supreme Court and order it to reinstate the judgment of the District Court granting partial summary judgment and permanently enjoining respondent from engaging in any activity in connection with the offering or operation of its bank credit card program in the State of Minnesota in violation of Minn. St. §48.185.

Respectfully submitted,

LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

By John Troyer

J. Patrick McDavitt

500 Roanoke Building

Minneapolis, Minnesota 55402

612 - 339-0661

*Attorneys for Petitioner*

*The Marquette National*

*Bank of Minneapolis*



**Add-1**

**ADDENDUM A**

**UNITED STATES CONSTITUTION, ARTICLE VI**

*Debts; supremacy; oath*

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

**ADDENDUM B**

**TITLE 12, UNITED STATES CODE, SECTION 85**

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal

## Add-2

reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. R.S. §5197; June 16, 1933, c. 89, §25, 48 Stat. 191; Aug. 23, 1935, c. 614, §314, 49 Stat. 711.

## ADDENDUM C

### MINNESOTA STATUTES 1976 SECTION 48.185

Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant

## Add-3

to Chapter 50 may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed \$7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed \$5,000, nor shall it extend such credit for any purposes other than personal, family or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitles the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank

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or savings bank and charged to the debtor's open end loan account with the bank or savings bank:

(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge shall be charged on the balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

(a) that the law of another state shall apply:

Add-5

(b) that the person consents to the jurisdiction of another state; and

(c) which fixes venue;

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the re-



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quirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.

Added by Laws 1976, c. 196, §5, eff. April 9, 1976.

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ADDENDUM D

Letter dated May 25, 1978, from William E. Morrow, Jr.  
to Warren Spannaus, Minnesota Attorney General

---

LAW OFFICES  
SWARR, MAY, SMITH & ANDERSEN  
3535 Harney Street  
Omaha, Nebraska 68131  
(402) 341-5421

May 25, 1978

Honorable Warren Spannaus  
Attorney General  
State of Minnesota  
St. Paul, Minnesota 55155

Attention: Jean E. Heilman, Special Assistant  
and T. Triemert, Complaint Analyst—File No. 78-025-1997

Dear Sir:

Our client, the First National Bank of Omaha, has received letters under date of May 18 and May 19 from your office concerning complaints filed with you by Robert J. Stiever and Victor P. Reim. Mr. Reim appears to be president of Commercial State Bank at Fifth Street at St. Peter in St. Paul, Minnesota. Mr. Stiever's address is 1460 North Chatsworth Street, St. Paul, Minnesota.

Both of these letters express inquiry concerning the Visa and Master Charge Credit Cards issued by First National Bank of Omaha.

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Mr. Stiever inquires whether the application is of deceptive quality and apparently complains in that the application for a credit card contains an agreement by the proposed cardholder to read and comply with the terms of an agreement which terms are not disclosed to him in advance. Mr. Reim indicates that the letter is misleading in that it says nothing about "the 18% interest rate on the outstanding balance".

We have elected to respond to both of these complaints with this single reply since they involve basically the same reasoning and the same materials.

As you are aware, the First of Omaha Service Corporation, a subsidiary of First National Bank of Omaha, is presently involved in litigation, to which your office is a party, in an effort to establish that the First National Bank of Omaha is entitled to charge rates allowed by Nebraska law. The Supreme Court of Minnesota has indicated that the First National Bank of Omaha is so entitled, however its order is stayed pending review in the Supreme Court of the United States. The Supreme Court of the United States has granted certiorari and the matter will presumably be submitted to them some time in the fall of 1978.

Under those circumstances, it was not possible at the time of commencing this solicitation, to advise prospective cardholders of the rates which would be charged. It is and has been the intention of First National Bank of Omaha to charge Nebraska rates as soon as the courts have decided that it may do so. Until such time, First National Bank of Omaha intends to charge rates not exceeding 1% per month on the outstanding balances. As a matter of fact, the rates which will be charged to Minnesota residents during the interim period until the Supreme Court of the United States rules, will be less than those authorized by the Minnesota statute.

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Federal Truth-in-Lending laws and regulations require that all of the details be disclosed to cardholders prior to the first transaction on the account. To the extent that applications are received and approved and cards issued, those statutes and regulations will be complied with and the information concerning charges et cetera will be furnished to the individuals with their cards. If at that point Mr. Stiever finds that the terms and conditions are burdensome or unacceptable to him, he will of course be absolutely free to simply return the card, thereby eliminating any obligation he may have under any supposed agreement. Mr. Reim, on the other hand, will at that point in time be in possession of appropriate facts which will permit him to evaluate his position and either renew or drop his complaint based upon facts rather than upon assumptions in which he is apparently indulging.

If the State of Minnesota or your office finds this procedure unacceptable during the time the matter is pending in the Supreme Court of the United States, please advise us and we will undertake to meet whatever reasonable requirements or requests you may have.

In view of the pending litigation, which appears to raise the same issues and questions as raised by these complaints, we assume that any action which your office elects to take will be consistent with and perhaps even a portion of that litigation.

Very truly yours,  
WILLIAM E. MORROW, Jr.

WEM/jk

cc: James Doody  
Clay Moore

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## ADDENDUM E

### Rules of Minnesota Appellate Procedure

#### Rule 136.02 Entry of Judgment; Stay

The clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment.

#### Rule 137.01 Judgment Roll

In all cases the clerk shall attach together the bond and notice of appeal certified and returned by the clerk of the trial court and a certified copy of the judgment of the Supreme Court, signed by him; and these papers shall constitute the judgment roll.

#### Rule 137.02 Execution; Issuance and Satisfaction

Executions to enforce any judgment of the Supreme Court may issue to the sheriff of any county in which a transcript of the judgment is filed and docketed. Such executions shall be returnable within 60 days from the receipt thereof by the officer. On the return of an execution satisfied in due form of law the clerk shall make an entry thereof upon the record.

#### Rule 140. Petition for Rehearing.

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days thereafter. Oral argument in support of the petition will not be permitted.

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Thirteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of \$25 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs.

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ADDENDUM F

Federal Rules of Appellate Procedure

Rule 36. Entry of Judgment

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Rule 40 (a) Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain

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such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

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ADDENDUM G

Title 28, United States Code, Section 2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.



Supreme Court, U. S.

FILED

JUL 28 1978

MICHAEL RODAK, JR., CLERK

**In The  
Supreme Court of the United States  
OCTOBER TERM 1978**

— 0 —  
**NO. 77-1258**  
— 0 —

THE STATE OF MINNESOTA, by  
WARREN SPANNAUS, its Attorney General,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

— 0 —  
**NO. 77-1265**  
— 0 —

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

— 0 —  
**On a Writ of Certiorari to the  
Supreme Court of Minnesota**  
— 0 —

**BRIEF OF RESPONDENT  
FIRST OF OMAHA SERVICE CORPORATION**  
— 0 —

SWARR, MAY, SMITH  
& ANDERSEN  
by William E. Morrow, Jr.  
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In The  
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—o—  
On a Writ of Certiorari to the  
Supreme Court of Minnesota  
—o—

**BRIEF OF RESPONDENT**  
**FIRST OF OMAHA SERVICE CORPORATION**  
—o—

**QUESTIONS PRESENTED FOR REVIEW**

1. Whether the jurisdiction of the Court was timely invoked by the Petitioners?
2. Whether the State of Minnesota has the power to prescribe a limitation upon the rates of interest which may be charged by any national bank, and especially a national bank located and established in Nebraska?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, the following statutory provisions are pertinent: 28 U. S. C. 2101 (c) (Add. 1); Minnesota Statutes § 56.13 (Add. 1); Nebraska Revised Statutes § 8-820 (Add. 2); 12 U. S. C. § 94 (Add. 2).

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## STATEMENT OF THE CASE

The Petitioner, Marquette National Bank of Minneapolis (Marquette) filed its Complaint in the District Court for the Fourth Judicial District of Minnesota setting forth five causes of action against First National Bank of Omaha, First of Omaha Service Corporation, and Credit Bureau of St. Paul, Inc. (App. 7a). Count I was effectively disposed of when Marquette voluntarily dismissed the action as to First National Bank of Omaha (App. 5a). Counts III, IV, and V have never been ruled on by either the trial court (App. 123a) or the Minnesota Supreme Court (App. 155a). Consequently, only Count II of that Complaint is presented to this Court.

The Complaint, insofar as it is relevant here, alleges that Marquette is a national bank, having its principal place of business in Minneapolis, Minnesota and is engaged in the operation of a BankAmericard program in which it assesses a \$10.00 annual membership fee and finance charges of 1% per month on the average daily balance of customers who elect to defer payment; that

First National Bank of Omaha, a national bank having its principal place of business in Omaha, Nebraska and its wholly owned subsidiary, First of Omaha Service Corporation, had conspired with the Credit Bureau of St. Paul, Inc. to conduct a systematic solicitation of Minnesota residents to participate in a BankAmericard program in which finance charges of 1½% per month on the first \$999.99 of the balance were assessed upon the entire previous month's balance rather than upon the average daily balance. This Nebraska BankAmericard program was alleged to be in violation of a Minnesota statute (App. 10a, 11a).

First of Omaha Service Corporation and First National Bank of Omaha filed a petition for removal to Federal Court upon the grounds that a question of federal law was presented.

Marquette filed a motion to remand upon the ground that its causes of action originated under state law (App. 27a).

In view of the assertion by First of Omaha Service Corporation that Minnesota statute 48.185 was unconstitutional by reason of its pre-emption of Federal law, the State of Minnesota intervened as a party plaintiff in the action (App. 77a).

The matter was submitted to the trial court upon a stipulation of facts (App. 91a).

The trial court rejected the claim of pre-emption made by First of Omaha Service Corporation and held that the Minnesota statute was constitutional, that the BankAmericard program of First National Bank of Omaha violated it, and enjoined First of Omaha Service Cor-



poration from participating in or promoting that program in Minnesota (App. 139a).

The Supreme Court of Minnesota, upon appeal, held that 12 U. S. C. 85 had pre-empted the Minnesota statute, that the Omaha bank's program complied with the federal law, and reversed the trial court (App. 155a).

The First National Bank of Omaha's credit card program and that of the Marquette are similar in many respects. However, they differ markedly in others.

In each program funds are advanced or credit given by the banks only at the bank when the credit card voucher is presented (App. 91a). In each program payments are made to the banks at the bank after a statement is mailed to the cardholder (App. 91a).

In the Nebraska program every extension of credit for the purchase of goods and services is made for a minimum of 25 days without finance charge and only the periodic charge is made (App. 91a). In the Minnesota program the only extensions of credit without finance charges occur when the entire balance of the account is paid within 25 days of the statement and an annual fee of \$10.00 is charged in addition to the periodic charge.

---

### SUMMARY OF ARGUMENT

The Respondent argues that the decision of the Minnesota Supreme Court had achieved the requisite finality to start the running of the time in which to seek review in this Court on December 8, 1977. The Peti-

tions for Certiorari were filed more than ninety days thereafter and hence were out of time.

As to the merits, it is argued that Federal law has pre-empted State legislation insofar as defining usury and prescribing remedies therefor where national banks are concerned. Since this action seeks only to apply and enforce a State statute defining usury and purporting to apply directly to national banks and providing a remedy therefor and is expressly and explicitly not based upon the Federal statute, the decision of the court below was correct and its order should be affirmed.

It is further argued that even if this action had been properly brought under the applicable and operative Federal statute, that statute, when properly interpreted in accordance with prior decisions of this court would, on either of two grounds, that is, (1) the Federal statute establishes the maximum rate which could be charged by reference to law of the state where that bank is located, in this case Nebraska, or (2) the Federal statute establishes such rate by reference to the law of the State of Minnesota and both states permit rates in excess of that charged by First National Bank of Omaha, require that the decision of the Court below be affirmed. Finally, it is argued that the statute under which Petitioners proceeded does not extend to or include a case in which there is no bank as a defendant.

## ARGUMENT

**I. The petitions for certiorari were not timely filed and this Court lacks jurisdiction to determine this case.**

This Court lacks jurisdiction in this case for the reason that the Petitions for Writs of Certiorari were not timely filed.

Congress, in the exercise of its power to prescribe exceptions and regulations of this Court's appellate jurisdiction, enacted 28 U. S. C. 2101 (c) which requires that the writ of certiorari be applied for within ninety days after the entry of the judgment or decree in the court below.

All parties are agreed that the opinion of the Supreme Court of Minnesota which was entered on November 10, 1977 did not become final because a petition for rehearing was filed on November 21, 1977.

All parties agree that the decision of the Minnesota Supreme Court denying rehearing was entered on December 8, 1977.

All parties agree that a document entitled "Judgment" was signed by the Clerk of the Minnesota Supreme Court on December 14, 1977.

Substantial disagreement exists as to which of these latter two events rendered the decision final and started the time for seeking review in this Court.

It would appear clear from the language of the order signed by a justice of the Supreme Court of Minnesota

that the Clerk of that Court was without authority to sign or enter the "Judgment" on December 14, 1978.

The order of the Court which was entered on December 8, 1977 specifically provided:

"Respondent Marquette National Bank is herewith granted a stay of judgment pending application for a writ of certiorari to the United States Supreme Court."

Thereafter, on March 10, 1978, Respondent filed an application to vacate the stay of judgment (App. 200a), and on April 10, 1978 the Minnesota Supreme Court, by its Chief Justice, denied the motion to vacate the stay (App. 204a).

From the foregoing, it is clear that the court felt that no judgment had been entered. The ministerial act of the Clerk of that Court taken on December 14, 1977 can probably be explained by the provisions of the Minnesota Rules of Appellate Procedure 140 which provides:

"The filing of a petition for rehearing stays the entry of the judgment. It does not stay the costs."

In any event, it seems clear that the Minnesota Court intended that nothing further should be done in that court until a petition for certiorari was filed in this Court and ruled upon.

In *Department of Banking v. Pink*, 317 U. S. 264 (1942), reh. den. 318 U. S. 802 (1942) this Court ruled that a petition was not timely filed. On June 18, 1942 the Court of Appeals ordered a decision of the Appellate Division of the New York Supreme Court affirmed. On June 25, the Supreme Court made the order of the Court

of Appeals its order. Thereafter a motion to modify the order of the Court of Appeals was filed, considered, and on July 29 granted. This motion did not, however, seek reargument or rehearing. On September 16 the Supreme Court made the order of July 29 its order. The petition for certiorari was filed on October 20. This court decided that the motion seeking modification of the Court of Appeals order was not such that it raised any question concerning the finality of the decision or the rights of the parties and therefore did not toll the running of the time in which review must be sought. The court then went on, because of other questions pending before it in other cases, which questions had recurred frequently, and added a discussion for the guidance of the Bar as to what constituted a final decision by a lower court for the purpose of seeking Supreme Court Review. It said:

"For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (\*\*\*), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (\*\*\*). Where the order of judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of this judgment for purposes of review is established." 317 U. S. at 268.

See also *Citizens Bank of Michigan City v. Opperman*, 249 U. S. 448 (1919); *U. S. v. Adams*, 383 U. S. 39 (1966); and annotation 10 A. L. R. 2d 1075.

Petitioners rely heavily upon *Puget Sound Power & Light Co. v. King County*, 264 U. S. 22 (1924), a case in which a rehearing had been granted and the case reargued. Under Washington law it was contemplated that in all cases where a decision became final that a judgment would thereafter be entered. That case appears to be in conflict with the later decision in *Department of Banking v. Pink*, supra. It can and should be distinguished from the present case in that the Supreme Court of Minnesota did not contemplate or intend that any judgment be entered in that court until this Court had ruled on the petition for certiorari and did not and does not recognize that any judgment has yet been entered in that court.

It is submitted that the petitions in this Court were not filed within 90 days after the Supreme Court of Minnesota had "in fact fully adjudicated rights and that adjudication is not subject to further review by a state court". Since they were not so filed they were not timely and these petitions should be dismissed for lack of jurisdiction.

**II. Federal law (12 U. S. C. 85) pre-empts state law in the area of interest rates chargeable by national banks, and in the remedies to be granted for violation thereof.**

The Constitution of the United States provides that federal law is the supreme law of the land and that the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. Article IV, Clause 2, U. S. Constitution.



Since at least 1864 the laws of the United States have contained a provision regulating the interest rates which may be charged by a national bank. Section 30 of the National Bank Act of 1864 was described by this Court:

"These clauses [§ 30] examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject." *Farmers & Merchants National Bank v. Dearing*, 91 U. S. 29 (1875).

At that time, Section 30 contained not only the regulations as to allowable rates of interest, which has now become Section 85 of Title 12 of the U. S. Code, but also the provisions regarding remedies for the violation thereof which are now found in 12 U. S. C. § 86. The Court, in determining that state law could have no effect and had been pre-empted by the Federal statute, said:

"\* \* \* the States can exercise no control over them (national banks) nor in any wise affect their operation, except insofar as Congress may see proper to permit. Anything beyond this is 'an abuse because it is the usurpation of power which a single state cannot give.'" 91 U. S. at 34.

Similarly, in *Hazeltine v. Central National Bank*, 183 U. S. 132 (1901), this court said:

"We understand it to be conceded that, as the note is given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking act and not by the law of the state." 183 U. S. at 134.

And in *Evans v. National Bank of Savannah*, 251 U. S. 108 (1919), it is said:

"Respondent is a national bank. Its powers in respect of discounts, whether transactions by it are usurious, and subsequent penalties therefor, must be entertained upon a consideration of the National Bank Act \* \* \*". 251 U. S. at 109.

"The maximum interest rate allowed by the Georgia statute is 8 per centum. That marks the limit which a national bank there located may charge upon discounts, but its right to retain so much arises from Federal law. The latter also completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate." 251 U. S. at 114.

In the light of such authority, and the other precedents of this court, such as *Tiffany v. National Bank of Missouri*, 85 U. S. 409 (1874); *Barnet v. Muncie National Bank*, 98 U. S. 556 (1879); *Daggs v. Phoenix National Bank*, 177 U. S. 549 (1900); *Schuyler National Bank v. Thrush*, 191 U. S. 451 (1903), it is difficult, if not impossible, to believe that anyone can seriously contend that state law can operate directly upon the rate of interest a national bank may charge.

Since Marquette has consistently insisted that its cause of action in this matter arises only under Minnesota statutory and common law (App. 27a), the rule that Federal law is the exclusive basis for determination of the question of interest rates a national bank may charge requires that Marquette's action be held to have been based upon a state statute which, insofar as it applies in this case, has been pre-empted and is of no force or effect. In fact, the Petitioners, upon the record in this case, cannot state a valid cause of action. Neither of them have paid or been charged any interest under First National Bank

of Omaha's credit card program. Inasmuch as 12 U. S. C. 86 provides the exclusive remedy for violation of 12 U. S. C. 85, *Farmers & Merchants National Bank v. Dearing*, supra, they lack standing to complain of a violation of § 85, the only effective statute regulating the rate of interest which First National Bank of Omaha may charge. The Supreme Court of Minnesota's order, therefore, was correct and should be affirmed.

Similar reasoning will compel affirmance of the lower court insofar as the claims of the Attorney General of Minnesota are concerned. He is attempting to defend the Minnesota statute, which purports to regulate the rate of interest a national bank may charge. The State of Minnesota lacks the power to enact such a regulation inasmuch as the federal law prohibits the states from exercising control over national banks or in any wise affecting their operation except as Congress may see proper to permit. *Farmers & Merchants National Bank v. Dearing*, supra.

The argument is made that the Minnesota statute should be sustained since it establishes or creates a "class" of loans, i. e., bank credit card loans, and treats all banks, both national and state, the same. This argument presents an issue neither submitted to nor decided by the courts below. Under *Tiffany v. National Bank of Missouri*, supra, and other cases here cited, it seems clear that although a state has the unquestioned power to enact legislation which discriminates against its own banks, such legislation will not be effective against a national bank. It is submitted that the proper "class" of loan in this matter is consumer credit and that any categorization by type of lender or source of credit such as is here attempted is improper. See *United Missouri Bank of*

*Kansas City, N. A. v. Danforth*, 394 F. Supp. 774 (D. C. Mo. 1975).

The decisions of this court have clearly established for over 100 years that no state may prescribe the interest rates which national banks may charge since that is a matter for Congress to determine. Congress has determined that the rates to be allowed to national banks will be that allowed by the states where the banks are located. That Congressional determination, however, does not permit a state to establish a rate for national banks that is different from or less than that allowed by its laws to the other lenders. The Minnesota statute attempts to do so and the decision of the Minnesota Supreme Court that it is invalid should be sustained.

Although the briefs of the petitioners devote a great deal of time to the question of the meaning of 12 U. S. C. 85, it is submitted that this Court need not even reach that question to decide this case. Both Petitioners deny that 12 U. S. C. 85 is applicable and seek only to enforce a state statute which has been pre-empted and cannot be constitutionally allowed to operate. This Court should hold that statute unconstitutional and affirm the lower court.

**III. Insofar as the rates of interest which may be charged are concerned, federal law gives to national banks a position of the most favored lender.**

If this Court feels that the mere determination that the National Bank Act, being the supreme law of the land, pre-empts state legislation is not sufficient to dispose of

this case, then it will be necessary to consider the meaning of 12 U. S. C. 85.

That statute provides, in pertinent part:

"Any association may take, receive, reserve, and charge on any loan or discount made, \* \* \* interest allowed by the laws of the State, Territory, or District where the bank is located, \* \* \* and no more, except that where by the laws of a State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

That provision has been included in the law since it was adopted as part of Section 30 of the National Bank Act of 1864.

It appears clear from simply reading the statute that it permits a national bank to charge interest at the highest rate allowed by the laws of the State where the bank is located.

Petitioners argue that the statute is silent regarding interstate loans. The statute speaks inclusively. The language is "on *any* loan".

Petitioners argue that the statute appears to be in conflict with a policy of "competitive equality" which they somehow discern as underlying the entire National Bank Act.

Petitioners attempt to argue the "intent of Congress" from legislative history which is far from clear.

These two arguments are intertwined and must be analyzed together. The congressional intent of competitive equality is said to be demonstrated by several in-

stances such as branching, capitalization, conversion and mergers, and fiduciary powers, in which Congress has elected to provide parity between state and national banks. In view of the facts that the Act of 1864 was establishing a new system of national banks, that Congress intended to protect them against state discrimination, and that they were referred to as national favorites by this Court, it is doubtful that such a theory can be supported and this is especially true when the fact that each of the instances which are used to demonstrate such intended equality are based upon statutes enacted by the Congress long after 1864.

The complete answer to such arguments is to be found in the prior decisions of this court. Within 10 years of the adoption of the National Bank Act, this court was called upon to interpret what is now Section 85. *Tiffany v. National Bank of Missouri*, 85 U. S. 409 (1874).

In that case, a national bank had made a loan upon which it charged 9% interest. The law of Missouri generally allowed a rate of 10% but it limited state chartered banks to a rate of 8%. The bank was sued for recovery of the alleged usurious interest. This court held that the National Bank Act was the sole provision of law regulating the rate of interest that a national bank might charge and that a proper interpretation of that act permitted the national bank to charge a rate of interest higher than that allowed to state banks.

In doing so, it said:

"\* \* \* It cannot be doubted, in view of the purpose of Congress in providing for the organization



of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if state statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, national banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statute of the state to banks which might be authorized by the state laws, unfriendly legislation might make their existence in the state impossible. A rate of interest might be prescribed so low that banking could not be carried on except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been national favorites. \* \* \* 85 U. S. at 412, 413.

From that time forward it has been the law that national banks, in the area of usury, are not to be held to a status of competitive equality with state banks but are to be accorded a limited advantage so that they will be permitted to charge a rate of interest at least as high as is allowed to any other lender. This position as the "most favored lender" has been upheld by this court in

several subsequent decisions. See *Farmers & Merchants National Bank v. Dearing*, supra; *Hazeltine v. Central National Bank*, supra; *Evans v. National Bank of Savannah*, supra; *Barnet v. Muncie National Bank*, supra; *Daggs v. Phoenix National Bank*, supra; *Schuyler National Bank v. Thrush*, supra. It has likewise been recognized and followed by lower courts. See *Northway Lanes v. Hackley Union Nat. Bank & Trust*, 464 F. 2d 855 (6th Cir. 1972); *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), cert. den. 429 U. S. 1062 (1977); *First National Bank in Mena v. Nowlin*, 509 F. 2d 872 (8th Cir. 1975); *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977); *Hiatt v. San Francisco Nat. Bank*, 361 F. 2d 504 (9th Cir. 1966), cert. den. 385 U. S. 1021; *Acker v. Provident Nat. Bank*, 373 F. Supp. 56 (D. C. Pa. 1974), aff'd in part, rev'd on other grounds, 512 F. 2d 729 (3rd Cir. 1975); *United Missouri Bank of Kansas City N. A. v. Danforth*, 394 F. Supp. 774 (D. C. Mo. 1975); *Commissioner of Small Loans v. First National Bank of Maryland*, 268 Md. 305, 300 A. 2d 685 (1973); *State National Bank of Connecticut v. Cohen*, 32 Conn. Sup. 245, 349 A. 2d 729 (1975); *Fitzgerald v. United Virginia Bank of Roanoke*, 139 Ga. App. 664, 229 S. E. 2d 138 (1976); *Westminster Nat. Bank v. Graustein*, 270 Mass. 565, 170 N. E. 621 (1930); *Cooper v. Nat. Bank*, 21 Ga. App. 356, 94 S. E. 611 (1917); *Farmers Nat. Bank v. McCoy*, 42 Okl. 420, 141 P. 791 (1914).

It has been formally recognized by the Comptroller of the Currency in his regulations. See 12 C. F. R. § 7.7310 (Add. 3). This Court has always given great deference to the interpretation given to a statute by

those charged with its administration. *Udall v. Tallman*, 380 U. S. 1 (1965). While such interpretations were in effect, the Act has been considered and amended by the Congress at least three times. 48 Stat. 191, 49 Stat. 711, 88 Stat. 1558. At least the last of these amendments was apparently designed to permit national banks to make loans at rates higher than would be allowed by some states, was adopted at a time of short credit supply, and to overcome the inertia of the states in amending their interest laws.

In that situation, it would appear to be fruitless to speculate that either "Congressional intent" or changed circumstances should be utilized by this court to change the law. Any change in a doctrine which has been settled in the law for over 100 years, even though it may lead to what some feel are undesirable results, ought to be left to Congress and not undertaken by the courts. See *Mercantile National Bank v. Langdeau*, 371 U. S. 555 (1963).

The Minnesota Supreme Court must be numbered among those who feel the results are undesirable. It also recognized that the remedy, if any, should come from the Congress:

"Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created." (App. 168a).

First National Bank of Omaha is entitled to charge interest at the highest rate allowed by the law of the state where it is located by virtue of the provisions of 12 U. S. C. § 85. Petitioners assert, however, that the meaning of "located" is not clear and insist that in this case,

where one of the parties to a loan is a resident in one state and the other party is a resident or located in another state that reference must be made to the law of the state where the borrower resides. Although Marquette makes much of its assertions that the credit card loans here involved are made in Minnesota, we simply point out that the question was neither presented to nor decided by the lower courts in this matter. The stipulated facts make it clear that the credit extended in payment for goods and services in connection with the First National Bank of Omaha's BankAmericard program is advanced by the Bank when the sales draft reaches Omaha (App. 93a). Payments on the credit card account are due and payable in Omaha (App. 94a). Certainly these facts are at least as consistent with the loans being made in Nebraska as in Minnesota. The actions of the merchants and agent banks involved, while they may be said to be extending credit in a technical sense, are more nearly analogous to cashing a check on an out of town bank.

Be that as it may, however, we do not understand the Petitioners' contentions in this regard. Assuming that the activities of the First National Bank of Omaha are such that it could be said that the bank is "existing" in Minnesota, a state of fact not shown by the record, it is still difficult to imagine that it would no longer be "located" in Nebraska. While it may be, and probably is, true that a bank can be located or existing in more than one place, see *Citizens and Southern National Bank v. Bouslog*, — U. S. —, 98 S. Ct. 88 (1977), that fact alone would not change the meaning or application of the Federal statute when it authorizes the bank to charge inter-



est at the rate allowed by the law of the state where it is located. If that is indeed the fact, it would seem that the result would be to permit the bank to charge interest at the rate allowed by the law of either state since it is located in both. This result is clearly in accordance with both of the Circuit Court opinions. *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), cert. den. 429 U. S. 1062 (1977); *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8 Cir. 1977).

The essential weakness of the Petitioners' arguments that § 85 does not apply to loans made to residents of one state by a national bank located in another state is perhaps best demonstrated by their citation of and reliance upon *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E. D. La. 1969) as the only judicial authority supporting their position. The trial court in that case entered an order granting a new trial (See App. 7, Respondent's Brief in Opposition to Certiorari). In that state of the record it cannot be said to be authority for any proposition, yet only the amicus Conference of State Bank Supervisors had the integrity to advise the Court of that fact.

Nor can the argument that the result in this case permits Nebraska to export its interest rates withstand examination. It is obvious that the Federal law, which is effective in both Minnesota and Nebraska and hence needs no exportation, is the law which establishes the permissible interest rates in this case. Even if that were not so, and if it were either possible or necessary to establish that the loans here involved took place in either Minnesota or Nebraska, obviously the law of one of those

states would have to be exported. There is nothing in the record upon which to base a judgment as to which should prevail. If a decision were to be made on that basis a great many factors would have to be considered, among which are:

1. Is a bank credit card program a necessary and desirable service for the people?
2. If so, can such a program exist under the laws of Minnesota?
3. If not, is the desirability of such a program sufficient to outweigh the policy underlying the Minnesota laws?

Merely to state these questions demonstrates the inadequacy of this record to support any decisions which must necessarily reflect the answers.

Petitioners attempt to argue that the *Alden* cases (*Alden's Inc. v. LaFollette*, 552 F. 2d 745 (7th Cir. 1977), cert. den., — U. S. — (1977), and *Alden's Inc. v. Packel*, 524 F. 2d 38 (3d Cir. 1975), cert. den. 425 U. S. 943 (1976) somehow support their argument. Those cases are clearly distinguishable since they do not involve any question of supremacy of Federal law over state law. Further, if they had done so it is clear that their result would have been different. The Third Circuit Court said:

"We suggest, then, that the commerce clause limits the power of a state to impose its choice of law on any transaction that is within the broad ambit of congressional power to regulate interstate commerce and

(1) is one in which Congress has made its own choice of law:" 524 F. 2d at 45.



Since 12 U. S. C. 85 clearly contains a choice of law by Congress, the state could not, under that decision, impose its own choice.

**IV. The rates charged by First National Bank of Omaha in its BankAmericard program are authorized by 12 U. S. C. 85, whether reference is made to the law of Minnesota or the law of Nebraska.**

Under the most favored lender doctrine as established by 12 U. S. C. 85 and the decisions of this Court, First National Bank of Omaha is entitled to charge the highest rate allowed by the law of the state in which it is "located, organized or existing". It is clear that such rate need not be established by the statutory law of the State. *Daggs v. Phoenix National Bank*, 177 U. S. 549 (1900). It is equally clear that if state law allows a higher rate to some lenders than to state banks, the higher rate is allowed to national banks in that state. *Tiffany v. National Bank of Missouri*, supra.

Application of this principle to the present case will reveal that the arguments of the petitioners and of the amicus curiae are largely groundless or are completely unsupported by the record.

These include Minnesota's arguments concerning its public policy and the protection of its citizens against excessive interest charges, Marquette's argument that the decision somehow places it at a competitive disadvantage, the State Bank Supervisor's argument that unless state banks are permitted to charge as much as national banks they cannot continue to operate, and the argument of the

AFL-CIO that it has an interest in protecting its members from excessive charges.

Perhaps the first point to be made is that it is not shown, and cannot be determined from the record, whether the Minnesota credit card rate, taking the \$15 annual fee into consideration, is higher or lower than the Nebraska rate of 18%. It can be mathematically determined that on any account which has an average deferred balance of \$250 the charges are the same. It can be similarly determined that on any account with a smaller average deferred balance the Minnesota charges are greater. Likewise, on accounts with a larger average deferred balance the Nebraska charges would be greater ( $\$250 \times 18\% = \$45$ ;  $250 \times 12\% = \$30 + 15 = \$45$ ). As to the total return a bank can expect on its credit card program, an essential element of the argument of the State Bank Supervisors, no conclusions can be reached without a great deal more evidence. Certain inferences can be drawn from the fact that this action is not brought by a consumer or even on behalf of a class of consumers who are claiming that they are being overcharged. Rather, it was brought by a bank in an effort to prevent another bank from entering its market and competing with it. This becomes especially interesting in view of the fact that Minnesota law allows consumer loans by small loan companies in which interest is charged at a rate of 33% on the first \$300, 18% on the next \$300, and 15% on the next \$600 loaned. This is a composite rate on the first \$1,000 of 21.4%. Minnesota Statute 56.13. Since the Marquette has elected not to charge that rate of interest, a rate which, as a most favored lender it could charge, it might be reasonably inferred that the actual return on its overall program is

greater when it charges the lower percentage rate and in addition collects the annual fee. This is a likely result in view of the proportion of credit card accounts which are paid in full on a monthly basis and which, without the annual fee, would generate no income for the bank.

In any event, it is quite clear that both Nebraska (§ 8-820 Neb. Rev. Stat. (Add. 2)) and Minnesota (Minnesota Statute § 56.13 (Add. 1)), do, by statute, allow rates of interest as high or higher than that charged by First National Bank of Omaha and that the law of either state would permit the Omaha bank, as a most favored lender, to charge those rates.

This being the case, the judgment of the Minnesota court should be affirmed.

**V. There are alternative grounds upon which the judgment of the Minnesota Court should be affirmed.**

Although the Minnesota court's decision was a correct application of 12 U.S.C. 85 and should be affirmed upon that ground, there are alternative reasons for its affirmance. This case does not involve a defendant bank, nor for that matter any defendant which charges or collects any interest or finance charges at all, and is therefore not within the Minnesota statute.

Subdivision 7 of Minnesota Statute 48.185 specifically provides that an action of this nature may be brought against a *bank or savings bank*. This action was originally brought against First National Bank of Omaha and complied with the Minnesota statute. The plaintiff, for reasons known only to itself, but probably in an effort to

avoid the effects of 12 U.S.C. 94, which would have required that the case be tried in Nebraska, dismissed the action as to the Bank. It thereby took the matter outside the scope of the statute which in itself would justify dismissal.

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**CONCLUSION**

Since the Petitions for Writ of Certiorari in these cases were not timely filed, they should be dismissed for lack of jurisdiction. If that is not done, the decision of the Supreme Court of Minnesota should be affirmed since it correctly interpreted and applied the controlling federal statute.

Respectfully submitted,

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Dated this 26th day of July, 1978.

**ADDENDUM**

28 U. S. C. 2101 (c). Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Minnesota Statutes § 56.13. Limitation of Loans; Interest; Investigation Charge. Subdivision 1. Every licensee hereunder may lend any sum of money not to exceed \$1,200 in amount, and may contract for and receive thereon a charge at a rate not exceeding two and three-quarters percent per month on that part of the unpaid principal balance of any loan not exceeding \$300, one and one-half percent per month on that part of the unpaid principal balance of any loan in excess of \$300 but not exceeding \$600, one and one-quarter percent per month on any remainder of such unpaid principal balance; provided in addition the licensee may collect from the proceeds of any loan an investigation charge of \$1 for each \$100; or fraction thereof, of the principal amount loaned, for expenses including any examination or investigation of the character and circumstances of the borrower, comaker or security, and drawing and taking the acknowledgment of necessary papers, filing fees, or other expenses incurred in making the loan; provided that no such charge shall be collected unless a loan shall have been made. The full amount of the investigation charge authorized by this subdivision shall be fully earned by the time a loan is made

without regard to the expenses incurred and shall not be deemed interest; provided, however, if a loan for which an investigation charge was made is renewed within 12 months from the date of the loan, then 1/12 of such investigation charge shall be deemed earned for each month or portion thereof from the date of the loan to the date of renewal, and the balance thereof shall be refunded to the borrower. A loan shall be deemed to be renewed at the time the loan is paid in full if any part of such payment is made out of the proceeds of another loan from the same or affiliated lender. Not more than six months of accrued charges on the unpaid principal balance shall be included in any judgment entered on any loan made hereunder.

Nebraska Revised Statutes § 8-820. Personal loans; interest on unpaid balance; fee in lieu of interest. Subject to the provisions of sections 8-815 to 8-829, any registered bank may contract for and receive, on any personal loan, charges at a rate not exceeding eighteen per cent simple interest per year on the first one thousand dollars and twelve per cent simple interest per year on the balance over one thousand dollars. Notwithstanding the provisions of this section, a bank may charge a minimum fee of five dollars in lieu of interest on small loans.

12 U. S. C. § 94. Venue of suits. Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.



Add. 3

12 C.F.R. § 7.7310. A national bank may charge interest at the maximum rate permitted by state law to any competing state-chartered or licensed lending institution. If state law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of state law, relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company or morris plan bank, without being so licensed.

IN THE  
**Supreme Court of the United States**  
 October Term 1978

Supreme Court, U. S.  
 FILED

OCT 20 1978

MICHAEL ROBAK, JR., CLERK

No. 77-1258

THE STATE OF MINNESOTA, by WARREN  
 SPANNAUS, its Attorney General,

*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,

*Respondent.*

No. 77-1265

THE MARQUETTE NATIONAL BANK  
 OF MINNEAPOLIS,

*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
 SUPREME COURT OF MINNESOTA

REPLY BRIEF OF PETITIONER  
 STATE OF MINNESOTA

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**IN THE**  
**Supreme Court of the United States**

October Term 1978

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No. 77-1258

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THE STATE OF MINNESOTA, by WARREN  
SPANNAUS, its Attorney General,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

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No. 77-1265

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THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

---

REPLY BRIEF OF PETITIONER  
STATE OF MINNESOTA

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**I. THE TERM "LOCATED" IN 12 U.S.C. § 85, WHICH SECTION PROVIDES THAT A NATIONAL BANK MAY CHARGE INTEREST AT THE RATE ALLOWED BY THE STATE WHERE IT IS LOCATED, SHOULD BE CONSTRUED CONSISTENT WITH THE INTENTION OF CONGRESS AS EVIDENCED BY THE LEGISLATIVE HISTORY. CONGRESS INTENDED THAT INTEREST RATES BE ESTABLISHED BY LOCAL GOVERNMENTS AND DID NOT INTEND THAT A BANK DOING BUSINESS IN OTHER STATES BE ALLOWED TO CHARGE CUSTOMERS IN THOSE STATES THE RATE OF ITS HOME STATE.**

Respondent and the amici supporting respondent's position have stressed that section 85 plainly states that the law of the state where the bank is "located" governs interest rates; that respondent is "located" in Nebraska since Omaha is its principal place of business; and that it necessarily follows that Nebraska interest rates govern respondent's credit card accounts wherever it does business.<sup>1</sup> Petitioner State of Minnesota suggests to the contrary; "located" is not a term with a single, precise meaning for all circumstances.

When interpreting "located" as used in the National Bank Act, it is possible that the term could have several meanings. A banking institution is, after all, an intangible corporate entity. As such, "located" could conceivably refer to the location of the entity's principal office, as respondent suggests. Or, it could refer to the principal office of one of its affiliates or subsidiaries. It could refer to a branch office of the entity

<sup>1</sup> See e.g. Brief Of The Consumer Bankers Association As Amicus Curiae at 3, 5; Brief Of The First National Bank of Chicago As Amicus Curiae at 5; Brief of Respondent First Of Omaha Service Corporation at 14.

or of one of its affiliates or subsidiaries. Or, instead of referring to an office, "located" could refer to a place where some asset of the bank, its affiliate, or subsidiary is situated. It is also possible that instead of referring to anything physical, "located" could refer to the intangible presence of the corporate entity. In this sense, a bank might be said to be located where either it or one of its affiliates or subsidiaries is incorporated, is licensed to do business as a foreign corporation,<sup>2</sup> or is engaging in economic activity of some kind<sup>3</sup> even though it is not licensed to do business as a foreign corporation. It would be possible for an entity to be "located" in multiple or different locations. The identification of these locations depends upon the context in which the term "located" is used.

As an amicus supporting respondent points out, the term "located" is used in a number of sections of the National Bank Act.<sup>4</sup> This Court has already acknowledged that what located means in the Act depends upon the context in which it is used. In *Citizen's & Southern National Bank v. Bougas*, — U.S. —, 98 S.Ct. 88 (1977)—a case decided under the venue provision of the National Bank Act, 12 U.S.C. § 94—this Court

<sup>2</sup> Respondent First of Omaha Service Corporation is licensed in the State of Minnesota to do business as a foreign corporation.

<sup>3</sup> Cf. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (defendant foreign insurance company subject to jurisdiction of California court where insurance contract delivered in California, premiums mailed from California, insured resident of California, even though defendant had no offices or agents in California and had done no insurance business there apart from subject policy). *Bank of America v. Whitney Central National Bank*, 261 U.S. 171 (1923), cited by Amicus First National Bank of Chicago at p. 5 of its brief as holding that the defendant was not located in New York even though it did extensive business there, is not to the contrary. The case says nothing of where the bank is located. It merely holds, under 1923 due process concepts, that the bank did no business in the forum district.

<sup>4</sup> Brief Of The First National Bank of Chicago As Amicus Curiae at 5.

recognized that "there is no enduring rigidity about the word 'located.'" — U.S. at —, 98 S. Ct. at 94. The Court acknowledged that in deciding what located means, the legislative history must be consulted. In *Bougas*, it was determined that the intention of Congress in providing that a national bank may be sued in a state court only in the county or city in which the bank is located, was to prevent interruption of a bank's business that might result from compelled production of records in distant forums. This being the purpose behind the "located" language of the venue provision, the Court went on to find that in this day of improved data processing and transportation, the intention of Congress would not be fulfilled by an unduly rigid definition of "located." Accordingly, the Court held that for venue purposes, a bank is located wherever it has a branch office, as well as at its principal office.<sup>5</sup> Flexibility in the application of the term "located" is also demonstrated in *Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Company, Inc. and Mellon Bank, N.A.*, 244 S.E.2d 212 (S.C. 1978), *cert. denied* — U.S. — (filed Oct. 10, 1978). Denying certiorari, this Court let stand a decision of the South Carolina Supreme Court which held that a foreign national bank which used a local company to handle certain aspects of a loan transaction (such as receiving funds and making disbursements) can be deemed

<sup>5</sup> The precedential worth of section 94 venue cases cited by Amicus First National Bank of Chicago at 5-6 of its brief, i.e., *Klein v. Bower*, 421 F.2d 338 (2nd Cir. 1970), *Buffum v. Chase National Bank*, 192 F.2d 58 (7th Cir. 1951), *cert. denied* 342 U.S. 944 (1952); and *Helco, Inc. v. First National City Bank*, 470 F.2d 883 (3rd Cir. 1972)—must be questioned in light of *Bougas*.

"located" in South Carolina within the meaning of both sections 12 U.S.C. § 1348 and § 1941. Section 1348 provides that for diversity jurisdiction purposes a national bank is deemed a citizen of the state where it is located, and section 94 provides that suits against national banks must be venued in a state, county or municipal court where the bank is located. Thus, the Pittsburgh bank was "located" in South Carolina even though it did not itself have offices or employees in that state. *C.f. Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48 (9th Cir. 1974), *cert. denied* 419 U.S. 844 (1974).

Clearly, as with other sections of the National Bank Act, what "located" means in section 85 should be decided only after reviewing the legislative history and Congressional intent. This evidence demonstrates that Congress intended that state governments determine the interest rates to be charged within their borders. The remarks of Congressman Blaine of Maine, Cole of California, and Senators Sherman of Ohio, and Trumbull of Illinois discussed at pp. 21-25 of Petitioner State of Minnesota's initial brief clearly demonstrate this intention. On the other hand, if this Court adopts the definition of "located" advocated by respondent, it will stray far from Congress' basic intention; the extraterritorial application of usury laws could hardly be more contrary to the stated goal of the enactors of section 85. For example, even though a state such as Minnesota may have exercised its police powers to enact strict usury limitations to protect its citizens, a national bank could establish its principal place of business in some

state, such as Maine, New Hampshire, or Massachusetts, which has no maximum contract interest rate limitation,<sup>6</sup> and charge Minnesotans high interest rates with impunity from Minnesota usury laws. This "lowest common denominator" approach to state usury laws has absolutely no support in legislative enactments nor the history surrounding section 85.

Respondent's proposed construction of section 85 would not only have been distasteful to the Congress which enacted section 85, it would also be inconsistent with opinions of this Court which have implicitly recognized the strong interest which individual states have in exercising their police powers to enact interest rate limitations.<sup>7</sup> The very reluctance with

<sup>6</sup> See 1 CCH Consumer's Credit Guide § 510.

<sup>7</sup> See e.g. *Griffith v. Connecticut*, 218 U.S. 563 (1910) (usury limitations are a valid exercise of state's police power); *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 172 U.S. 351 (1899) (where state enacts law making usurious contracts made within the state void and providing for cancellation and nullification of them, federal courts will not invoke their equity powers to prevent application of the state cancellation and nullification remedies).

In *E. C. Warner Co. v. W. B. Foshay Co.*, 57 F.2d 656 (8th Cir. 1932), *cert. denied* 286 U.S. 558, (1932), a conflict of law case in which the issue was whether the law of Minnesota (where the usurious contract was made and to be performed) or the law of Delaware (where defendant corporation was organized) should apply, the Court commented that a state legislature should not be allowed to bind its sister states in respect to contracts within the sister's territory:

If the contention of plaintiff was accepted, however, the state of Delaware has enacted a police measure controlling in Minnesota, irrevocable by a Minnesota Legislature although a Minnesota Legislature would be powerless to tie the hands of succeeding Legislatures . . . 'The police power is an attribute of sovereignty.' We are not convinced that the state of Delaware can impose upon the State of Minnesota a statute which, if given the effect contended for must result in the foreign state exercising a portion of the police power of the state of Minnesota and to that extent its sovereign power.

57 F.2d at 663 (citations omitted).

which the Minnesota Supreme Court reached the decision here on appeal reflects the strong Minnesota policy concerning interest rates. Recently, Iowa rendered an opinion wholly consistent with this position. In *Iowa ex rel. Turner v. First of Omaha Service Corp.*, — Iowa —, 269 N.W.2d 409 (August 30, 1978), the Iowa Supreme Court held that Iowa's Consumer Credit Code interest rates applied to a foreign national bank soliciting and extending credit to Iowa citizens. It held that Congress did not intend in section 85 to give national banks engaged in interstate lending such favored status that they could avoid all provisions of Iowa usury law.

Petitioner State of Minnesota submits that the Court can and should construe the term "located" consistent with the legislative history of section 85 and consistent with the strong interest of the state legislatures in controlling interest rates charged within their borders. In the context of a national bank which systematically solicits Minnesota residents for credit cards to be used in transactions with Minnesota merchants the bank must be deemed to be "located" in Minnesota for purposes of this credit card program.

## II. SECTION 86 DOES NOT PREEMPT STATE LAW WHICH ALLOWS INJUNCTIONS PROHIBITING CHARGING OF USURIOUS INTEREST.

Respondent contends<sup>8</sup> that section 86 of the National Bank Act provides the exclusive remedy for usurious interest rates charged by national banks, and that it preempts all state remedy provisions. Respondent then concludes that since none of the petitioners have been charged interest under respondent's credit card program they lack standing to sue under section 86.

<sup>8</sup> Respondent's brief at 11.



Section 86 neither preempts the injunctive relief provisions of Minn. Stat. § 48.185, subd. 7 (1976) of the Minnesota Bank Credit Card Act, nor state common law under which this action has been maintained.<sup>9</sup> Section 86<sup>10</sup> provides that a national bank which charges interest in excess of the limitations of 12 U.S.C. § 85 forfeits the entire interest charged, and is liable to the debtor for a penalty in the amount of twice the interest paid. The courts have held since *Farmers and Merchants National Bank v. Dearing*, 91 U.S. 29 (1895), that a debtor charged usurious interest by a national bank cannot avail himself of penalties provided under a state usury law, but is limited to the recovery authorized by section 86. However, neither the express language of section 86 nor the cases construing that section address the propriety of types of relief that are not punitive in nature, such as the injunctive relief authorized by subdivision 7 of the Minnesota Bank Credit Card Act or by state common law. In *State v. The First National Bank of Clark*, 2 S. D. 568, 51 N.W. 587 (1892), appeal

<sup>9</sup> Minn. Stat. § 48.185, subd. 7 (1976) provides in pertinent part:

Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section.

Petitioner Marquette National Bank brought suit under this section as a bank injured competitively by respondent's violations of Minn. Stat. § 48.185. The State of Minnesota was granted plaintiff-intervenor status and filed its own complaint seeking declaratory, injunctive and other relief under section 48.185, subd. 7 and upon common law public nuisance grounds.

<sup>10</sup> 12 U.S.C. § 86 reads in pertinent part:

The taking . . . or charging a rate of interest greater than is allowed by the preceding section [12 U.S.C. § 85], when knowingly done, shall be deemed a forfeiture of the entire interest. . . . In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back . . . twice the amount of the interest thus paid from authorities taking or receiving the same. . . .

*dismissed*, 163 U.S. 686, the court held that section 86 did not preclude prosecution of a national bank under a South Dakota statute which defined the taking of illegal interest as a misdemeanor. The court held that section 86 was directed only to redress between the parties to the loan, and did not displace the state's exercise of its police power. Similarly, in this case the State of Minnesota is seeking injunctive relief for violation of a statute enacted under its police powers.

To assert that the cases should be interpreted to preclude injunctive relief to a state acting under its police powers, would do great violence to the philosophy espoused by this Court in *First National Bank in St. Louis v. State of Missouri*, 263 U.S. 640 (1923). In that case the Attorney General of Missouri sought to enforce a state statute prohibiting branch banking against a national bank. The Court described the interrelationship between state and federal regulation of national banks as follows:

National banks are brought into existence under Federal legislation, are instrumentalities of the Federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of the state in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies, or conflict with the paramount law of the United States.

263 U.S. at 656 (citations omitted). The Court concluded that the Missouri prohibition of branch banking did not interfere with any of the federal policies embodied in the National Bank Act. It further held, in language directly applicable to the case at bar, that Missouri could enforce its branch

banking law against the national bank through a *quo warranto* proceeding in its state court:

. . . since the sanction behind [the state statute] is that of the state, and not that of the national government, the power of enforcement must rest with the former, and not with the latter. To demonstrate the binding quality of a statute, but deny the power of enforcement, involves a fallacy made apparent by the mere statement of the proposition; for such power is essentially inherent in the very conception of law . . . . What the state is seeking to do is to vindicate and enforce its own law; and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation . . . . Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute. *In other words, the national statutes are interrogated for the sole purpose of ascertaining whether anything they contain constitutes an impediment to the enforcement of the state statutes; and the answer being in the negative, they may be laid aside as of no further concern.*

263 U.S. at 660-661 (emphasis added). This Court's philosophy of allowing state regulation, except where it directly conflicts with federal regulation, should not be abandoned in this case since it is based on long-standing congressional policy<sup>11</sup> and precedent. Moreover, recognition of the strong state

<sup>11</sup> See Brief of Petitioner State of Minnesota at 10-13. Brief of Petitioner Marquette National Bank at 21-22; Brief of Amicus Conference of State Bank Supervisors at 19-22.

interest in usury laws would follow this Court's recent preemption rulings in which it has viewed invalidation of state regulation with disfavor and has urged that state and federal regulatory schemes be reconciled whenever possible.<sup>12</sup>

It is not difficult to reconcile the limitations on recovery by a wronged debtor provided in section 36 with the authorization to enjoin the taking of usurious interest provided in subdivision 7 of the Minnesota Bank Credit Card Act, and with the common law authority of the State of Minnesota to enjoin usury as a public nuisance. The federal law is designed to insure a punitive remedy for debtors who have already been charged usurious interest; the Minnesota law is designed to protect the public interest by preventing lending banks from charging usurious interest to future customers. The Minnesota law does not conflict with the federal law. To the contrary, it complements the federal law by providing an effective remedy against national banks which repeatedly disregard the limitations of that law. As the *St. Louis Bank* case illustrates, application of state law remedies to national banks is appropriate wherever state law has not been displaced by federal law. Accordingly, 12 U.S.C. § 86 does not bar the use of state law remedies to enjoin respondent's violation of the limits on credit card interest charges.

<sup>12</sup> See Brief of Petitioner State of Minnesota at 7-10.



**III. EVEN UNDER THE MOST-FAVORED LENDER DOCTRINE ADVANCED BY RESPONDENT, NATIONAL BANKS CANNOT UTILIZE INTEREST PROVISIONS OF A STATE STATUTE SUCH AS THE MINNESOTA SMALL LOAN ACT, AND IGNORE THE OTHER SUBSTANTIVE PROVISIONS OF THE SMALL LOAN ACT AND THE STATE CASE LAW INTERPRETING THAT STATUTE.**

The respondent argues<sup>13</sup> that because it is a national bank, it can charge 18 percent interest on its credit card transactions under the "most-favored lender" theory, first announced in the case of *Tiffany v. National Bank of Missouri*, 18 Wall. (85 U.S.) 409 (1873). Respondent urges that the *Tiffany* decision allows national banks to utilize any state statute which permits another lender in the state to charge a higher interest rate than that allowed to a state bank<sup>14</sup> regardless of the type of loan. Respondent reasons at page 23 of its brief, that since section 86 as interpreted in *Tiffany* authorizes it to utilize the highest interest rate allowed any other lender under Minnesota law, it may, in connection with its BankAmericard program in Minnesota, charge the rates permitted Minnesota small loan companies.<sup>15</sup>

<sup>13</sup> Respondent's brief at 23-24.

<sup>14</sup> The Court in *Tiffany* based its holding on language of section 85 which provides that a national bank can charge interest at the rate allowed by the laws of the state where a bank is located, and no more "except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." The Court reasoned that unless national banks were allowed to charge the highest rates allowed state lenders, national banks might fall victim to state legislatures bent on discriminating against state banks. Consequently, this would place national banks at a disadvantage in relation to the favored state lenders allowed to charge higher rates.

<sup>15</sup> See Minn. Stat. §§ 56.01-56.26 (1976).

Although there is authority which would permit a national bank under certain circumstances to use the interest rates allowed a most-favored lender (such as a small loan company), respondent's contention is erroneous since the national bank must strictly adhere to the limitations of the state statute concerning, for example, size maturity, and compounding of interest on the loan.<sup>16</sup> See *Citizens' National Bank of Kansas City v. Donnell*, 195 U.S. 369 (1904) (if state law prohibits compounding of interest, national bank may not compound *even though* the interest as compounded does not exceed the maximum allowable uncompounded, simple interest); *Acker v. Provident National Bank*, 512 F.2d 729 (3rd Cir. 1975) and *Partain v. First National Bank of Montgomery*, 467 F.2d 167 (5th Cir. 1972) (if state law prohibits compounding of interest, national bank may not compound); *American Timber & Trading Co. v. First National Bank of*

<sup>16</sup> Respondent and Amicus The Consumer Bankers Association cite a number of cases and imply that they hold that a national bank can select the highest rate allowed any lender in a state, irrespective of the rate allowed state banks. However, it is clear that this was not the issue in these cases. *Farmers & Merchants National Bank v. Dearing*, 91 U.S. 29 (1875) (whether state penalty or section 86's penalty applies); *Hazeltine v. Central National Bank*, 183 U.S. 132 (1901), (whether section 86 was the applicable penalty); *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919), (whether section 86 applies to discounting on single-payment short term notes); *Barnet v. Muncie National Bank*, 98 U.S. 555 (1879), (whether penalty provisions of section 86 applied under the facts of the case); *Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900), (whether section 86 applied under the facts); and *Schuyler National Bank v. Gadsden*, 191 U.S. 451 (1903), (what was national bank rate under Section 85, if state law allowed all lenders any rate if agreed to in writing). In addition, all of the cases cited by Respondent and The Consumer Bankers Association deal with fact situations where the national bank was doing business in a state where it was chartered, not where the bank was dealing in interstate loans, and attempting to select the most favorable rate allowed a lender other than a state bank. These were *not* cases where a national bank was attempting to select the usury law of one type of loan transaction and apply it to a totally different type of credit transaction.



*Oregon*, 511 F.2d 980 (9th Cir. 1973) *cert. denied* 421 U.S. 921 (1975) (if state law prescribes a certain method of interest computation, national bank may not compute interest otherwise); *First National Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975) (if state law prohibits discounting of interest on installment loans, national bank cannot discount). Moreover, it has been held that the National Bank Act adopts the entire case law of the state which interprets the state's limitations on usury. *First National Bank in Mena v. Nowlin*, *supra*. Various opinions and letters of the Comptroller of the Currency reflect the clear rule of law that national banks must comply with the limitations of state law if they wish to avail themselves of a most-favored lender provision. The Comptroller's Digest of Opinions at paragraph 9510, cited in *Partain v. First National Bank of Montgomery*, stated that:

Where state law permits a higher-than ordinary interest rate on specified classes of loans (for example, small loans), a national bank which makes loans at such special rates is subject to all limitations of substance with respect to size, maturity of the loan, and the like, which are prescribed by the State statute authorizing the higher rate.

*Partain v. First National Bank of Montgomery*, *supra*, 467 F.2d at 173 n. 5. A letter of a Deputy Comptroller also cited in *Partain* stated:

[A]s to loans made at higher than ordinary interest rates, the specifications of the state statute with respect to maturity, size and method of repayment of the loan would be applicable since they are component parts of the laws permitting higher than ordinary interest charges.

*Id.* Thus, it is clear under both the case law and the Comptroller's opinions and letters that a national bank may not select the interest rate from a most-favored lender statute, and ignore the other provisions of the statute defining the conditions and limitations under which a lender may make that type of loan.

In the present case, respondent cannot use Minnesota's small loan law as a basis for the interest rates it charges on its credit card program, because the program does not conform to limitations of the small loan law. First, the small loan law applies only to "closed-end" loans; that is, loans of a specified amount and for a specified period of time. Respondent's program, however, contemplates loans which are "open-ended." Their amounts vary with the customer's use of the card and are therefore not specified in terms of amount. And respon-

dent's program contemplates an extension of credit which may go on for a virtually indefinite period of time—if a cardholder does not pay a monthly bill, the loan is extended indefinitely or, at least, until collection activity by respondent is initiated. Therefore, the loans of respondent's program are not specific as to the period of time over which they are extended.

Second, the small loan law does not permit loans greater than \$1,200. Under respondent's program, loans of undetermined maximum amounts well in excess of \$1,200 could be made.

Third, the small loan act allows varying rates of interest, the allowable rate varying with the amount of the loan. At the loan amount of \$600, the small loan act would allow an interest rate of 15%. Under respondent's program, however, 18% would be charged on a \$600 loan. Other examples of how respondent's credit card program does not conform with the small loan act could be given.

The purpose of the "most-favored lender" theory was to ensure that national banks have competitive equality with local lenders making the same kind of loans. Since small loan companies do not operate credit card plans they are not competitors in this commercial area. There is no policy justification for extending the "most-favored lender" theory in these circumstances. Thus, respondent's deviations from the requirements of Minnesota's small loan law surely defeat its claim that the interest rates permitted by that law justify using 18% interest rates in its BankAmericard program in Minnesota.

#### IV. THIS COURT SHOULD NOT ENTERTAIN RESPONDENT'S CLAIM THAT THE COURT BELOW MISINTERPRETED MINN. STAT. § 48.185 IN FINDING THAT STATUTE APPLICABLE TO RESPONDENT'S ACTIVITY ON BEHALF OF THE OMAHA BANK.

Respondent argues as an alternative basis for affirmance of the decision of the court below that its actions and proposed actions on behalf of the Omaha Bank do not bring it within the scope of Minn. Stat. § 48.185 subd. 7 (1976).<sup>17</sup> This claim is a state law issue which has been determined adversely to respondent by the Minnesota Supreme Court and, therefore, is not subject to review by this Court. The finality of a state high court's determination of a substantive state law question has been settled since *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590 (1875).<sup>18</sup>

In the case at bar the Hennepin County District Court ruled:

As agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha, has

<sup>17</sup> Respondent's brief at 24-25.

<sup>18</sup> See generally C. Wright, A. Miller, E. Cooper & E. Gressman, 16 Federal Practice and Procedure § 4021 at 675-682 (1977).

violated and threatens to continue to violate Minnesota Statutes, § 48.185.<sup>19</sup>

The Minnesota Supreme Court first noted that the district court had treated the case against respondent as if its parent organization, the Omaha Bank, were the defendant. App. 161a. The Minnesota Supreme Court accepted this finding without reexamining the question because it stated in the next paragraph that "[t]he principal issue is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state."<sup>20</sup>

Therefore, the applicability of section 48.185 to respondent's activities in Minnesota on behalf of the Omaha Bank has been decided by the Minnesota Supreme Court and should not be reviewed by this court.

#### V. THE PETITIONS FOR CERTIORARI WERE TIMELY FILED.

The petitions for certiorari were filed within ninety days of the Clerk's entry of the Minnesota Supreme Court's judgment. This Court was thereby vested with jurisdiction to review the Minnesota Supreme Court's judgment pursuant to 28 U.S.C. § 2101(c). Respondent suggests at pages 6-9 of its brief, however, that because in respondent's view the Minnesota Supreme Court "did not contemplate or intend" that any judgment be entered by the Clerk, the judgment must apparently

<sup>19</sup> Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment of the Hennepin County District Court (No. 726526, Feb. 10, 1977), at App. 129a.

<sup>20</sup> The Minnesota Court's application of section 48.185 to a subsidiary of a national bank parallels the Comptroller of the Currency's regulation applying all federal banking laws, in the absence of an express exemption, to operating subsidiaries of a national bank. 12 C.F.R. § 7376 (d).

be regarded as a nullity from which petitioners could not seek review.

Respondent's argument as to the intentions of the Minnesota Supreme Court notwithstanding, it cannot be disputed that the Clerk of the Minnesota Supreme Court did in fact enter that Court's final judgment promptly upon disposition by the Court of the petition for rehearing<sup>21</sup>. Surely, petitioners were entitled to rely on this judgment, the entry of which remains undisturbed and unchallenged by respondent in the Minnesota Supreme Court, in computing the time to seek review in this Court.

Furthermore, respondent's suggestion that the Supreme Court of Minnesota never intended that judgment be entered is completely unfounded. Both the order of the Minnesota Supreme Court denying petitioner Marquette National Bank's request for rehearing and the subsequent order denying respondent's motion to vacate its stay refer to a "stay of judgment" by the Minnesota Court.<sup>22</sup> Respondent speculates that the words "stay of judgment" indicate that the Minnesota Court intended to stay entry of judgment pending application for review in this Court. But it is far more reasonable to construe the Minnesota Court's order as a stay of the "execution" of its judgment pursuant to 28 U.S.C. § 2101(F) rather than a stay of entry of judgment. It can be inferred that this interpretation was applied by the Minnesota Court's Clerk when he proceeded to enter judgment upon the Minnesota Court's order of December 8, 1977. It can also be inferred that

<sup>21</sup> Indeed, it would appear that under the Rules of the Minnesota Supreme Court the Clerk may have had a duty to proceed with entry of judgment upon disposition of the petition for rehearing:

The filing of a petition for rehearing stays the entry of judgment *until disposition of such petition*.

Rule 140, Minn. R. Civ. App. P. (emphasis added); Brief for petitioner the Marquette National Bank, Add-9.

<sup>22</sup> App. 197a, 204a.



the Minnesota Supreme Court viewed its stay of judgment in the same light, inasmuch as it rejected respondent's motion to vacate the stay which was premised upon the argument that timely application for writs of certiorari had not been made.<sup>23</sup>

As the petitions for certiorari clearly were filed within ninety days of the Minnesota Supreme Court's judgment, they are timely within the rule laid down in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924). However, respondent erroneously intimates that this Court's holding in *Puget Sound* was overruled *sub silentio* by a subsequent dictum in *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). In *Puget Sound*, the Court held that where local practice provides for the entry of judgment in a state appellate court following the filing of that court's decision, it is from the date of the appellate court's judgment and not the date of decision that the period for seeking review in the United States Supreme Court is to be computed. The *Pink* case, on which respondent relies, dealt with the separate question of whether the date of entry of judgment in the state appellate court or the later date of entry of judgment by the trial court on remittitur from the state appellate court was the proper date from which to compute the period for review. As in *Puget Sound*, the Court in *Pink* held that the period for review must be computed from the time of the state appellate court's judgment. In a latter decision, *Commissioner v. Estate of Bedford*, 325 U.S. 283 (1945), the Court implicitly reaffirmed *Puget Sound*, and distinguished *Pink* from those cases where established local practice provides for the entry of a formal judgment in the appellate court. The Court in *Bedford* upheld as timely, a writ of certiorari filed within sufficient time after filing by the clerk of a federal appellate court's "judgment"

<sup>23</sup> App. 200a-204a.

but too long after the filing of the court's "opinion."<sup>24</sup> The *Pink* decision is therefore inapposite to cases such as the instant one, where the established practice is to enter judgment in the state appellate court. This court should hold that the petitions were timely and that it has jurisdiction to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

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<sup>24</sup> The practice of the Second Circuit at the time of the *Bedford* decision was to first issue its "Opinion" following which its clerk would proceed to file an "Order for Mandate," the latter document having the essential attributes of a judgment. *Commissioner v. Estate of Bedford*, 325 U.S. 283, 285-96 (1945).

Supreme Court, U. S.  
FILED

OCT 20 1978

MICHAEL RUDEK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1253

THE STATE OF MINNESOTA, by WARREN  
SPANNAUS, its Attorney General,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

No. 77-1265

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

REPLY BRIEF  
FOR PETITIONER THE MARQUETTE  
NATIONAL BANK OF MINNEAPOLIS

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## IN THE Supreme Court of the United States

October Term, 1978

No. 77-1258

THE STATE OF MINNESOTA, by WARREN  
SPANNAUS, its Attorney General,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

No. 77-1265

THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS,  
*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

REPLY BRIEF  
FOR PETITIONER THE MARQUETTE  
NATIONAL BANK OF MINNEAPOLIS

## INTRODUCTION

Essentially all of the substantive arguments raised in the Brief of Respondent have already been discussed in Petitioner's earlier Brief on the merits. Respondent has, however, raised three collateral issues not previously articulated to this Court: (1) the meaning of the Minnesota Supreme Court's "stay of judgment"; (2) the effect of Section 86 of the National Bank Act on petitioner's prayer for injunctive relief; and (3) the enforcement of Minnesota's Bank Credit Card Act against a bank service corporation.

In addition, petitioner also wishes to bring to the Court's attention the recent decision by the Supreme Court of Iowa in *State of Iowa v. First of Omaha Service Corporation*, — Iowa —, 269 N.W. 2d 409 (Case No. 203-61053, August 30, 1978). In this decision (reproduced herein at page Add. 1), it was held that the rate of interest charged in connection with the operation of the Omaha BankAmericard program in the State of Iowa is governed by Iowa law and *not* Nebraska law.

## ARGUMENT

### I. THE MINNESOTA SUPREME COURT'S STAY OF JUDGMENT WAS GRANTED PURSUANT TO 28 U.S.C. §2101 (f) AND WAS A STAY OF THE ENFORCEMENT, NOT THE ENTRY, OF THE JUDGMENT AGAINST PETITIONER.

With respect to the matter of timeliness of the petition for certiorari, respondent argues that the 90-day time limit of 28 U.S.C. §2101(c) should run from the date the Minnesota Supreme Court entered its order denying rehearing (December 8, 1977) instead of the date judgment was entered (December 14, 1977). The theory apparently relied upon by respondent for this conclusion is that the judgment was entered by the Clerk of the Minnesota Supreme Court<sup>1</sup> without authority.

In its Brief on the merits, respondent has taken the position that the "stay of judgment" entered by the Minnesota Supreme Court as part of its order denying rehearing (App. 197) was a stay of the *entry* of judgment and that, accordingly, the judgment should not have been entered. Such an argument not only misconstrues the intent of the Minnesota Supreme Court's Order of December 8, 1977, it also ignores the express provisions of 28 U.S.C. §2101(f). This latter provision states as follows:

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, *the execution and enforcement of such judg-*

<sup>1</sup> The case of *Department of Banking v. Pink*, 317 U.S. 264 (1942), reh. den. 318 U.S. 802 (1942), cited by respondent, involved the entry of the judgment by the clerk of the *trial court* on a remittitur from the state appellate court, *after* judgment had been entered by the appellate court. It is inapposite. Compare, *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924).

*ment or decree may be stayed* for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay." (Emphasis added.)

In conjunction with the filing of the petition for rehearing to the Minnesota Supreme Court (App. 172), petitioner made a letter request on November 21, 1977 (reproduced herein at Add. 17) that, in the event the court decided to deny the petition for rehearing, an order be entered pursuant to 28 U.S.C. §2101(f) staying "enforcement of the judgment." The Minnesota Supreme Court granted such a stay as a part of its December 8, 1977 Order denying rehearing:

"3. Respondent Marquette National Bank is herewith granted a stay of judgment pending application for writ of certiorari to the United States Supreme Court. The stay is conditioned upon the filing of a bond in the amount of \$10,000 with this court, approved by one of the justices of this court. The stay is further conditioned that if Marquette National Bank fails to make application for writ of certiorari with the United States Supreme Court within the time period allotted therefor or fails to obtain an order granting its application or fails to make its plea good in the United States Supreme Court, it shall answer

for all damages and costs which the appellant First of Omaha Service Corporation may sustain by reason of the stay." (App. 197-98).

In the context of petitioner's request for a stay of the enforcement of the judgment pursuant to 28 U.S.C. §2101(f), the only reasonable construction of the Court's reference to "a stay of judgment" is that it was intended as a stay of enforcement and not a stay of entry. As a further indication of this intent, the Court included, as a part of its stay order, the identical conditions set forth in 28 U.S.C. §2101(f).<sup>2</sup>

## II. SECTION 86 OF THE NATIONAL BANK ACT DOES NOT PRECLUDE THE INJUNCTIVE RELIEF GRANTED BY THE DISTRICT COURT AGAINST RESPONDENT.

The specific relief granted by the Hennepin County District Court herein was a permanent injunction:

"enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the state of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185." (App. 130).

<sup>2</sup> On March 10, 1978, respondent filed a motion with the Minnesota Supreme Court to vacate the stay on grounds that one of the conditions of the stay, *i. e.*, that petitioner make a timely application for writ of certiorari, had not been met (App. 200). The motion was denied (App. 204). Respondent now attempts to argue that this denial of its motion to vacate the stay should be construed as an indication by the Minnesota Supreme Court that no judgment had been entered. To the contrary, one could assume from denial of respondent's motion that the Minnesota Supreme Court considered the petition for writ of certiorari to have been timely filed, *i. e.* within ninety (90) days of the entry of judgment.



Respondent asserts in its Brief on the merits that 12 U.S.C. §86 preempts the entry of such a decree.

In this regard, there is no dispute that §86 of the National Bank Act establishes the exclusive *penalty* which may be assessed against a national bank for the collection of usurious interest. *See, e.g., Farmers' & Mechanics' National Bank v. Dearing*, 91 U.S. 29 (1875). Respondent, however, would have §86 construed to also preclude the issuance of an injunction against a national bank threatening to charge usurious interest.

Section 86 of the National Bank Act has never been construed as precluding the remedy of injunctive relief and respondent has failed to cite any authority for this proposition. To the contrary, the only case to address the issue states that, notwithstanding §86, the courts still retain the "equitable power to grant an injunction" against a national bank attempting to charge usurious interest. *Landau v. Chase Manhattan Bank*, 367 F. Supp. 992, 997 (S.D. N.Y. 1973). *Compare, State v. The First National Bank of Clark*, 2 S.D. 568, 51 N.W. 587 (1892), *app. dismissed*, 163 U.S. 686.

Respondent's suggestion that §86 impliedly abrogates the equitable remedy of injunctive relief would not only mean that the courts would be absolutely precluded from enjoining pre-announced usurious credit practices of national banks, it would also serve to take away any remedy whatsoever to a competing bank which faces the threat of injury or loss arising out of such a usurious credit program. There is nothing in §86 to support such a construction.

### III. MINNESOTA'S BANK CREDIT CARD ACT IS ENFORCEABLE AGAINST RESPONDENT AS THE SUBSIDIARY CREDIT CARD SERVICE CORPORATION OF THE FIRST NATIONAL BANK OF OMAHA.

The final argument raised by respondent in its Brief on the merits is one which was not even made before the Minnesota Supreme Court, *i.e.* whether M.S.A. §48.185 is enforceable against respondent as the subsidiary credit card service corporation of the First National Bank of Omaha. Respondent argues that Minnesota's Bank Credit Card Act may only be enforced against a bank and that, since respondent is not itself a bank, it is not subject to the injunctive relief provided by the statute.<sup>3</sup>

Minnesota's Bank Credit Card Act, M.S.A. §48.185, Subd. 6, prohibits banks from "personally, *or by an agent* or by mail" conducting "a continuous and systematic solicitation" of Minnesota residents to enroll them in a bank credit card program which is not in compliance, from a rate-structure standpoint, with the Minnesota Bank Credit Card Act. (Emphasis added). Furthermore, it is admitted that defendant First of Omaha Service Corporation is a wholly owned subsidiary of the First National Bank of Omaha and the agent of that bank in the State of Minnesota for purposes of soliciting and conducting that bank's credit card program in this State. *See, Stipulation of Facts, Paragraphs II and III* (App. 91-92) and Exhibits A, B and C thereto (App. 97-110).

<sup>3</sup> It is to be noted that by this argument respondent lays to rest any purported significance of 12 U.S.C. §86 in this case. Obviously, if respondent takes the position that no bank is affected by the injunction issued by the District Court, §86 can have no preemptive effect since it only applies to national banks.

Accordingly, there is little question that M.S.A. §48.185 is enforceable against respondent, as the operating credit card subsidiary of the First National Bank of Omaha, so as to enjoin any illegal solicitations or other activities in connection with the Omaha Bank's BankAmericard credit card operations in the State of Minnesota. To construe the statute in any other way would permit a bank to avoid the statute simply by employing agents to conduct its solicitations.

**IV. THE PETITIONER'S POSITION HAS BEEN RECENTLY UPHOLD BY THE SUPREME COURT OF IOWA IN *STATE OF IOWA v. FIRST OF OMAHA SERVICE CORPORATION, ET AL.***

On August 30, 1978, the Supreme Court of Iowa rejected the preemption arguments made by this same respondent in connection with the introduction of the Omaha BankAmericard program in the State of Iowa. *See, State of Iowa v. First of Omaha Service Corporation, supra* (Add. 1).

In that case, respondent sought to bring the Omaha BankAmericard program into the State of Iowa with the 18 percent per annum interest rate ceiling established under Nebraska law, and to ignore the 15 percent per annum interest rate ceiling established under Iowa law. The Iowa Attorney General brought an action to permanently enjoin such violation of Iowa law (Add. 2). Respondent's defense was the same as espoused herein; namely, that 12 U.S.C. §85 permits the First National Bank of Omaha to charge Nebraska interest rates even when it conducts its BankAmericard program in states other than Nebraska (Add. 5).

The Supreme Court of Iowa granted the requested permanent injunction and ruled that, when conducted in Iowa, the

Omaha BankAmericard program is governed by Iowa's interest rate ceiling (Add. 15). The Court refused to construe §85 as permitting a national bank to charge its home state's credit card interest rates when it conducts its credit card program in other states:

"It is our understanding the intended purpose of 12 U.S.C., Section 85, was to insure *intrastate* competitive equality among state lenders and national banks. Consequently, we seriously doubt an interpretation of that statute which would exempt out-of-state national banks from state laws which are applicable to all lenders in a state should be adopted as the law of this state. We decline to do so." (Add. 14).

In so holding, the Supreme Court of Iowa also declined to follow the decisions in the two *Fisher* cases,<sup>4</sup> as well as the decision of the Minnesota Supreme Court herein:

"If we were to follow the *Fisher* decisions in resolving the problem presented here, we would be compelled to ignore the express public interest this state has in protecting its citizens from excessive finance charges. Application of the *Fisher* extension of 12 U.S.C., section 85, to *interstate* credit transactions would in effect cause that statute to pre-empt the Iowa Consumer Credit Code in this area and carve for out-of-state national bank lenders an exception to the operation of the ICC. Thus, as stated in somewhat different words, national bank lenders located outside Iowa would not only have 'most favored lender status' in Iowa *but rights greater than the most favored lender in this state*" (Add. 14).

<sup>4</sup> *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), cert. den. 429 U.S. 1062 (1977) and *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977).

This same rationale is applicable in the present case. Under Minnesota law, the highest rate of interest which may be charged by *any lender* in connection with open-end credit transactions (including credit card plans) is 12 percent per annum. *See*, M.S.A. §§48.185 and 334.16.<sup>5</sup> This is to say that no lender in the State of Minnesota is permitted to charge more than 12 percent per annum for this type of credit transaction.<sup>6</sup> Thus, if the decision of the Minnesota Supreme Court is permitted to stand, national bank lenders located outside the State of Minnesota would not only have "most favored lender status" in Minnesota but rights greater than the most favored lender. Such a result would embrace competitive *inequality* rather than competitive equality intended by Congress in enacting §85.

<sup>5</sup> Minnesota's Open End Credit Sales Act (M.S.A. §334.16), reproduced herein at Add. —, establishes the maximum interest rate permitted non-bank credit card programs. Since it provides for the same 12 percent per annum interest rate ceiling as M.S.A. §48.185, the Open End Credit Sales Act has not been cited by respondent in its "most favored lender" argument. Nevertheless, these two statutes do establish the maximum interest rate permitted any lender in connection with credit card plans conducted in the State of Minnesota.

<sup>6</sup> Respondent would seek to characterize the Omaha BankAmericard program as coming within the type of credit transaction contemplated by Minnesota's Small Loan Act (M.S.A. §56.13). There is, however, nothing in either the statute itself, or in the record herein, to support such a contention. To the contrary, the prohibition against the compounding of interest under the Small Loan Act, M.S.A. §56.13, Subd. 3, effectively segregates "small loan" credit transactions from the open-end credit transactions contemplated under the Minnesota Bank Credit Card Act, M.S.A. §48.185, Subd. 3, whereby interest continues to be applied on a monthly basis to the average daily balance in the customer's account.

## CONCLUSION

Based upon the foregoing, and this petitioner's earlier Brief on the merits herein, the Court is respectfully urged to reverse the decision of the Minnesota Supreme Court and order the partial summary judgment of the District Court to be reinstated.

Respectfully submitted,

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Add-1

ADDENDUM A

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IN THE SUPREME COURT OF IOWA

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Filed August 30, 1978

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STATE OF IOWA ex rel.  
RICHARD C. TURNER, ATTORNEY GENERAL,  
Appellant,

vs.

FIRST OF OMAHA SERVICE CORPORATION OF  
OMAHA, NEBRASKA d/b/a BANK AMERICARD,  
AND

CENTRAL NATIONAL BANK & TRUST  
COMPANY, DES MOINES, IOWA,

Appellees.

---

Appeal from the Polk District Court—Harry Perkins, Judge.  
Plaintiff appeals from an adverse ruling of the trial court  
sustaining the motion of both defendants for summary judgment.—Reversed and remanded with directions.

Richard C. Tuner, Attorney General, and Julian B. Garrett,  
Assistant Attorney General, for appellant.

William E. Morrow, Jr., of Swarr, May, Smith & Andersen,  
of Omaha, Nebraska, and David A. Scott, of Davis, Scott &  
Grace, of Des Moines, for appellee First of Omaha Service  
Corporation.

Kenneth L. Butters of Stewart, Heartney, Brodsky, Thornton  
& Harvey, of Des Moines, for appellee Central National  
Bank & Trust Company.

Considered en banc.\*

---

\* MASON, J., serving after June 14, 1978, by special assignment.

MASON, J. (Serving after June 14, 1978, by special assignment)

The principal issue presented for review in this appeal is whether the trial court was correct in holding that on the basis of the National Bank Act, 12 U.S.C., section 85, a national bank located in Omaha, Nebraska, may legally charge rates of interest allowed by the laws of Nebraska on loans made to Iowa residents, even though such rates are in excess of the amounts allowed under the Iowa law.

12 U.S.C., section 85, in pertinent parts is as follows:

"Any association [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of State, Territory, or District where the bank is located \* \* \* and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

This case involves an action brought by the Attorney General seeking an injunction preventing defendants from assessing or collecting a finance charge in excess of that permitted by the Iowa Consumer Credit Code, chapter 537 (ICCA).

Defendant, Central National Bank & Trust Company (Central National) is a national bank located in Iowa. Defendant, First of Omaha Service Corporation (First of Omaha), a Nebraska corporation, is a wholly owned subsidiary of First National Bank of Omaha with its principal place of business in Omaha. It is authorized to, and in fact does, transact business in the State of Iowa.

Defendants are participants in the Bank Americard program. The Bank Americard plan is a national and international credit card system which enables a card holder to purchase goods and services on credit from participating merchants throughout the United States and the world.

The First National Bank of Omaha, which is not a defendant herein, is a national bank located in Omaha, Nebraska, is a card issuing member in the Bank Americard plan, and as such has issued cards to Iowa residents who qualify for them.

Central National, though it does not have authority to issue credit cards or extend credit directly in connection with Bank Americard transactions, does advertise the Bank Americard plan and solicits applications for Bank Americard which are then forwarded to the First National for acceptance or rejection and Central serves as a depository for Bank Americard sales forms deposited by participating merchants with whom First of Omaha has member agreements.

First of Omaha participates in the system by entering into agreements with merchants and banks in Iowa which govern their participation in the system.

Iowa card holders wishing to purchase goods and services or obtain cash loans, sign a Bank Americard form which is authenticated by the card holder's Bank Americard credit card, and exchange the signed form for goods and services or cash from the merchant or bank respectively. These forms are then deposited by the participating merchant in his account with Central National Bank or a similarly functioning bank which then forwards them to First National Bank of Omaha.

Plaintiff, as Attorney General of Iowa, is administrator of the ICCA and is authorized to bring actions to restrain people from violating the act which authorizes temporary relief.

November 1, 1974, plaintiff filed an action in the Polk District Court. His petition as amended is in two divisions. Division 1 seeks temporary and permanent injunctive relief to halt the following three activities of defendants: (1) assessing or collecting of finance charges in excess of the rate allowed by section 537.2402(3) of the ICCC; and (2) engaging in any future violations of sections 537.3205 or 537.2402 of the ICCC; and (3) assisting the First National Bank of Omaha in collecting finance charges which violate section 537.2402(3) of the ICCC. Division 2 of the petition seeks a declaratory judgment to the effect that the acts of defendants constitute a conspiracy to violate the National Bank Act, in particular 12 U.S.C., section 85, which provides that national banks may charge interest at the rate allowed by state law for state banks by the state where the loan is made.

Plaintiff also alleged in his petition as amended defendants had committed two other violations of the Iowa Consumer Credit Code. Plaintiff asserted defendants were assessing their Bank Americard customers a finance charge based on the balance owing at the beginning of the billing cycle without deductions for the payments or credits made during that cycle, in violation of section 537.2402(2), The Code. Plaintiff also claimed section 537.3205, The Code, was violated in that the interest rate was increased without the notice required by that section.

In a stipulation of facts, the parties agreed that the First National Bank of Omaha intended to assess a finance charge at the annual rate of 18 percent on credit extended between \$500 and \$999.99. Section 537.2402(3), The Code, limits the finance charge on such amounts to an annual rate of 15 percent.

Defendants filed separate answers. Central National generally denied the allegations of the petition and alleged in its answer that the credit extended to Iowa customers was extended outside of Iowa and in Nebraska, and, therefore, Nebraska law controlled. In its answer, defendant First of Omaha asserted 12 U.S.C., section 85, allowed a national bank to charge interest at a rate allowed by the laws of the state where the bank was located and that the rate charged by the First National Bank of Omaha, defendant's parent, as a national bank was legal under 12 U.S.C., section 85, since Nebraska law (section 8.820 Neb. Rev. Statutes, 1973 Supplement) allowed an annual maximum rate of interest of 18 percent to be charged on loans up to \$1000.

On November 29, 1974, defendants had the case removed to federal district court, but on October 9, 1975, the case was remanded to the Polk District Court on the grounds that the federal court lacked subject matter jurisdiction. See *State of Iowa ex rel. Turner v. First of Omaha S. C.*, 401 F.Supp. 439 (S.D. Iowa 1975).

October 23, defendants filed an application for separate adjudication of law points, seeking a ruling, in part, that since 12 U.S.C., section 85, applied, Nebraska law controlled the interest that could be charged Iowa residents by the First National Bank of Omaha.

September 3, 1976, the court ruled in part the finance charge which could be assessed by First National Bank of Omaha was limited by the rate ceiling of the Iowa Consumer Credit Code. The court ordered an injunction, restraining defendants from imposing a finance charge of greater than 15 percent on loans between \$500 and \$1000 as required by Iowa law.



On September 10, defendants filed separate motions for a new trial and corrections of findings of fact and conclusions of law. Defendants stated that the same issue as to which state law should be applied to determine the legal rate of interest which a national bank could charge had been presented in *Fisher v. First Nat. Bank of Chicago*, 538 F.2d 1284 (7 Cir. 1976), cert. den., 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 778, which involved an Illinois national bank and an Iowa borrower. In *Fisher*, the court ruled the law of Illinois controlled the interest rate which a national bank located in Illinois could charge borrowers who were Iowa residents.

On December 20, defendants each filed separate motions for summary judgment, both of which alleged that 12 U.S.C., section 85, mandated Nebraska law was applicable. Plaintiff resisted on the grounds that Federal law should be interpreted to put national banks on the same footing as other lenders making loans in Iowa and not to give national banks located outside of Iowa superiority over all other lenders.

On July 6, 1977, the court granted defendants' motions for summary judgment concluding the *Fisher* case provided sufficient legal precedent for such an action. It is this ruling which gives rise to plaintiff's appeal.

I. Plaintiff contends First National Bank of Omaha's imposition of a finance charge at an annual rate of 18 percent on amounts between \$500 and \$999.99 is illegal under section 537.2402(3), The Code, which provides:

"3. If the billing cycle is monthly, the charge may not exceed an amount equal to one and one-half percent of that part of the maximum amount pursuant to subsection 2 which is five hundred dollars or less and one and one-fourth percent of that part of the maximum amount which is more than five hundred dollars. If the billing cycle is not monthly, the maximum

charge for the billing cycle shall bear the same relation to the applicable monthly maximum charge as the number of days in the billing cycle bears to three hundred sixty-five divided by twelve. A billing cycle is monthly if the closing date of the cycle is the same date each month or does not vary by more than four days from the regular date."

Defendants, on the other hand, contend Iowa law is not applicable to determine the legal rate of interest which First National Bank of Omaha can impose as a finance charge on the Bank Americard accounts it has with Iowa residents.

This contention is based on defendants' argument that the legal rate which First National Bank of Omaha can charge must be determined under Nebraska law in light of the National Bank Act, 12 U.S.C. section 85, the pertinent part of which has heretofore been set out. They maintain that since First National Bank of Omaha is located in Nebraska, Nebraska law is applicable. Under section 8.820, Neb. Rev. Statutes, 1973 Supplement, a Nebraska bank can charge a finance charge at the annual rate of 18 percent on accounts between \$500 and \$999.99. Defendants further argue that since First National Bank of Omaha, the parent corporation of First of Omaha, is a national bank, the interest rate it can charge is controlled by 12 U.S.C., section 85.

The contentions of the parties present the problem whether section 85 requires that Nebraska law must be applied to determine the legal interest rate that a Nebraska based national bank can charge Iowa residents or whether Iowa law can be applied to determine the rate of interest which can be charged to Iowa residents.

The Seventh Circuit Court of Appeals interpreted 12 U.S.C., section 85, in *Fisher v. First Nat. Bank of Chicago*, 538 F.2d at 1291. The question presented in the cited case was whether

Illinois or Iowa law controlled the legal interest rate an Illinois based national bank could charge Iowa residents. A national bank located in Illinois was charging Iowa residents on the unpaid balances of their Bank Americard accounts a finance charge which was legal in Illinois. The court stated that under section 85, "\* \* \* Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa." (Emphasis in original).

In reaching the foregoing conclusion, the court rejected an interpretation of section 85 reached in *Meadow Brook National Bank v. Recile*, 302 F.Supp. 62, 75 E.D. La 1969), where that court held, "12 U.S.C. §85 Fixes the rate of interest chargeable by a national bank only as to loans made in the State where the bank is located, it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes loans in another."

The Seventh Circuit, 538 F.2d at 1290-1291, in refusing to follow this view said:

"We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."

In *Fisher v. First Nat. Bank of Omaha*, 548 F.2d 255, 258 (8 Cir. 1977), the court was faced with another action similar to the one faced by the Seventh Circuit except it was the First National Bank of Omaha which was charging interest rates allowable under Nebraska law to Iowa residents on unpaid

balances in Bank Americard accounts the bank had with Iowa residents. The Eighth circuit agreed with the Seventh Circuit's holding in *Fisher v. First Nat. Bank of Chicago* and ruled, "\* \* \* it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

The decisions in the two *Fisher* cases are a result of the rationale that the purpose of 12 U.S.C., section 85, was to give national banks competitive equality with other state lenders and to prevent the states from discriminating against national banks. In *Fisher v. First Nat. Bank of Omaha*, 548 F.2d at 259, the eighth Circuit Court of Appeals stated:

"12 U.S.C. § 85 was designed by Congress to place national banks on a plane of at least competitive equality with other lenders in the respective states, and, indeed, to give to national banks a possible advantage over state banks in the field of interest rates. Thus, a national bank is not limited to the interest rate that a state bank may charge with respect to a particular type of loan if another lender in the state is permitted to charge a higher rate of interest on the same type of loan. In that situation the national bank may charge the higher rate. This 'most favored lender' doctrine was recognized by the Supreme Court in *Tiffany v. National Bank of Maryland*, 18 Wall. (85 U.S.) 409, 21 L.Ed. 862 (1873), and it was discussed and applied by this court in *First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975)."

Plaintiff in response maintains that if, as defendants insist, the First National Bank of Omaha should be allowed to charge



a rate to Iowa residents which no other lender can legally charge, they are not arguing for equality but for superiority over *all* other lenders.

The problem in applying the rationale of the two *Fisher* cases was recognized in *Marquette Nat., Etc. v. First of Omaha Serv.*, — Minn.2d —, 262 N.W.2d 358. The Minnesota court was faced with the same issue as involved in the two *Fisher* cases. The Marquette National Bank of Minneapolis sought to enjoin the First National Bank of Omaha and its subsidiary, First of Omaha Service Corporation, a defendant in this case, from issuing Bank Americard credit cards and operating in Minnesota since the First National Bank of Omaha was operating its Bank Americard business in contravention of the Minnesota Credit Card Act (Minn. Stat., section 48.185). The First National Bank of Omaha assessed a finance charge at the annual rate of 18 percent on unpaid balances under \$1000 of Bank Americard accounts of Minnesota residents while section 48.185 only permitted an annual maximum rate of 12 percent on credit card accounts.

Since the First National Bank of Omaha was a party, the case was removed to the United States District Court for Minnesota. Marquette thereafter dismissed First National as a party defendant, resulting in the case being remanded back to the state district court because of lack of federal subject matter jurisdiction. The case then proceeded solely against First of Omaha.

The Minnesota court, — Minn.2d at —, 262 N.W.2d at 363, before reaching its conclusion, pointed out:

“\* \* \* [W]e have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest

rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit.”

The court followed the holdings of the two *Fisher* cases and ruled that First of Omaha could issue Bank Americard cards in Minnesota and charge interest rates allowed by Nebraska law. However, the court, — Minn.2d at —, 262 N.W.2d at 365, noted the following about the *Fisher* cases:

“The decisions reached in the *Fisher* cases injected a new attribute into the ‘most favored lender status,’ which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to the all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Bank Act.

“However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court’s order which enjoins Omaha Service from operating the Omaha Bank’s BankAmericard program by charging an interest rate in violation of § 48.185. Consistent with the reasoning in the *Fisher* cases,



the Omaha Bank may assess an interest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb.Rev.Stat. § 8-820."

The procedural history described in *Marquette* which appears to have been a compelling reason for the result reached by the majority is not a factor to be considered in resolving the case before us.

May 22, 1978, the United States Supreme Court granted a petition for writ of certiorari in the *Marquette National Bank* case.

In *United Missouri Bank of Kansas City v. Danforth*, 394 F.Supp. 774 (W.D. Mo. 1975), cited by the Eighth Circuit in *Fisher*, 548 F.2d at 259, plaintiffs were all national banking associations created and operating under the National Banking Act, 12 U.S.C., Section 21, and were all located in the state of Missouri. In *Danforth* plaintiffs sought a declaratory judgment that the Missouri Retail Credit Sales Act was not applicable to plaintiffs' bank credit card system by reason of the provisions of 12 U.S.C., section 85. The question presented related to whether the provisions of the Act excepting licensees under chapter 367, RSMo, from the definition of "retail seller" or "Seller" also excepts plaintiffs from that definition by operation of section 85 of Title 12.

We perceive no reason, at least at the present time, to disagree with the holding in the cited case. However, we call attention to the fact the credit transactions involved in *Danforth* were *intrastate* whereas in the case before us the transactions involved were *interstate*.

In considering the problem presented by this appeal we recognize the rate of interest that a national bank may charge is ultimately a question of federal law, and the matter is

governed by 12 U.S.C., section 85. *Fisher v. First Nat. Bank of Omaha*, 548 F.2d at 257.

As indicated, Iowa enacted a Consumer Credit Code consisting of sections 537.1101 to 537.7103, which were added by the 1974 Regular Session, Sixty-fifth General Assembly, chapter 1250, sections 1.101 to 7.103, to become effective July 1, 1974. Section 537.2402(3) limits the finance charge on credit extended between \$500 and \$999.99 to an annual rate of 15 percent.

At the time of the occurrence of the events giving rise to the *Fisher* cases Iowa did not have the ICC.

We must decide whether a national bank engaged in *interstate* business of credit card financing should be able to avoid the provisions of Iowa law relating to allowable interest rates.

Although we believe the dissent by Justice Scott in *Marquette*, concurred in by Justices Yetka and Wahl, presents a more rational approach to a resolution of the problem, we think there is merit in the majority's view in *Marquette* that the decision reached in the *Fisher* cases injected a new attribute into the "most favored lender status." In our opinion, this newly injected attribute, in the factual situation presented in the case before us, results in not only affording a national bank Nebraska lender a competitive equality with all other Iowa lenders including national banks located in this state in making similar types of loans in this state to Iowa residents, but it also results in affording a national bank Nebraska lender a superior advantage over all other lenders in competing for Bank Americard types of loans to be made in Iowa to Iowa residents which might well become "an unreasonable and destructive advantage" over all other lenders in this state.

The *Fisher* interpretation not only serves to permit a national bank Nebraska lender to assess the highest rate charged

by any person or entity in Iowa under like conditions, but it also permits a national bank Nebraska lender to charge a higher rate than the maximum permitted by the ICCC for all lenders for similar loans.

This appears to us to be contrary to the original purpose in adopting section 85 of the National Bank Act which was to impose the same interest ceiling on national banks as on the most favored lenders in the state without giving them an unconscionable and destructive advantage over all other state lenders in making similar types of loans.

In light of the fact that since July 1, 1974, Iowa has had a Consumer Credit Code which it did not have at the time of the occurrence of the events giving rise to the *Fisher* cases, it is our opinion that to apply the *Fisher* courts' view as to the effect of 12 U.S.C., section 85, to *interstate* credit transactions is an unwarranted extension of the "most favored lender status." If we were to follow the *Fisher* decisions in resolving the problem presented here, we would be compelled to ignore the express public interest this state has in protecting its citizens from excessive finance charges. Application of the *Fisher* extension of 12 U.S.C., section 85, to *interstate* credit transactions would in effect cause that statute to pre-empt the Iowa Consumer Credit Code in this area and carve for out-of-state national banks lenders an exception to the operation of the ICCC. Thus, as stated in somewhat different words, national bank lenders located outside Iowa would not only have "most favored lender status" in Iowa *but rights greater* than the most favored lender in this state.

It is our understanding the intended purpose of 12 U.S.C., section 85, was to insure *intrastate* competitive equality among state lenders and national banks. Consequently, we seriously doubt an interpretation of that statute which would exempt

out-of-state national banks from state laws which are applicable to all lenders in a state should be adopted as the law of this state. We decline to do so.

In regard to defendants' concern that the foregoing view would somehow result in the ICCC becoming the law of Nebraska, we find such anxiety is without basis. We are not saying the ICCC governs lending institutions doing business in Nebraska. What we do say is that national bank Nebraska lenders must adhere to the interest ceiling applying to *all* lenders making loans in the state of Iowa to Iowa residents for similar types of credit.

The trial court erred in granting defendants' motion for summary judgment.

With directions to the trial court to set aside its order of July 6, 1977, granting defendants' motion for summary judgment and to reinstate its order of September 3, 1976, determining the merits of plaintiff's claim for relief and to proceed with such steps as may be necessary to carry out such order, the case is—Reversed and remanded.

All Justices concur except LeGrand and Rees, JJ., who dissent, and Allbee and McGiverin, JJ., who take no part.

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No. 203

State of Iowa vs.

First of Omaha Service Corp.

LeGrand, J. (dissenting)

No matter how anxious we might be to "protect" Iowa credit-consumers from paying a higher rate of interest, the majority opinion is clearly contrary to the provisions of the applicable federal law governing interest rates chargeable by national banks. (12 U.S.C. §85). I agree with the Seventh Circuit Court of Appeals when it said, in discussing this same

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problem, any other result would be "to twist the plain meaning of the statute." *Fisher v. First National Bank of Chicago*, 538 F.2d 1284, 1290-91 (7th Cir. 1976), cert. den. 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed. 2d 778. The Eighth Circuit Court of Appeals reached the same conclusion in *Fisher v. First National Bank of Omaha*, 548 F.2d 255, 257 (1977), as did the Supreme Court of Minnesota—reluctantly but inevitably—in *The Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 262 N.W.2d 358 (Minn. 1977).

Both the statute itself and the cases which have considered it (with one federal district court exception cited in the majority opinion) require a holding that Iowa interest rates do not limit what defendants may charge. I find it strange that the majority concedes this in one breath by saying the rate of interest to be charged is "ultimately a question of federal law" while in the next it refuse to apply the statute according to its plain dictates.

The majority seems to have adopted the State's argument that allowing defendants to charge a higher rate of interest gives them an advantage over other lenders. Really the contrary is true. Certainly there is no difficulty today in obtaining credit cards; the problem is to avoid getting them. If this is true, defendants should be at a disadvantage when they overprice their commodity—credit—in a highly competitive market. There are, indeed, many areas in which consumers need protection, but this is not one of them. See special concurrence in *Marquette National Bank* at 262 N.W.2d, page 365.

I would affirm the trial court.

REES, J., joins in this dissent.

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## ADDENDUM B

LAW OFFICES OF  
LEVITT, PALMER, BOWEN, BEARMON & ROTMAN  
500 Roanoke Building  
Minneapolis, Minnesota 55402  
612—339-0661

November 21, 1977

Honorable Robert J. Sheran  
Chief Justice, The Supreme  
Court of Minnesota  
State Capitol Building  
St. Paul, Minnesota 55101

Re: *The Marquette National Bank of Minneapolis v. First of Omaha Service Corporation* File No. 47561

Dear Justice Sheran:

The Marquette National Bank of Minneapolis ("Marquette") has caused to be filed today with the Clerk of the Minnesota Supreme Court Petition for Rehearing in connection with the above-referenced matter. We enclose herewith a copy of the Petition for Rehearing. We understand the filing of the Petition for Rehearing stays the entry of judgment in this matter until disposition of the petition.

In the event the Petition for Rehearing is denied, Marquette intends to apply to the United States Supreme Court for Writ of Certiorari under 28 U.S.C. §1257(3). Under 28 U.S.C. §2101 (c), Marquette is required to file application for such Writ of Certiorari within 90 days after the entry of judgment in the above-referenced matter.

28 U.S.C. §2101(f) provides:

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ



of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a Justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or Justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

In the event the Minnesota Supreme Court elects to deny Marquette's Petition for Rehearing, we request that enforcement of the judgment of the Minnesota Supreme Court (lifting of the lower court's permanent injunction) be stayed for a reasonable time to permit Marquette to obtain a Writ of Certiorari from the Supreme Court.

Marquette has posted bond with Hennepin County District Court in the amount of \$10,000 as a condition to that court's granting of permanent injunctive relief. We are prepared to post the same bond with the Minnesota Supreme Court or such other bond as may be required.

Very truly yours,  
LEVITT, PALMER, BOWEN,  
BEARMON & ROTMAN

By John Troyer

JT/cn

cc: Clay Moore

William E. Morrow, Jr.

Richard Allyn

Dale Harris

## ADDENDUM C

### Minnesota Statutes, Section 334.16

Subdivision 1. Limitation of rates. The imposition, charge or collection of a finance charge upon an account balance by a seller of goods, services or both shall be lawful, provided that:

(a) The sale is a consumer credit sale pursuant to an open end credit plan, agreement or arrangement between the buyer and seller under which (1) the seller may permit the buyer to make purchases from time to time from the seller or other sellers, (2) the buyer has the privilege of paying the balance in full or in installments, and (3) a finance charge may be computed by the seller from time to time on an outstanding unpaid balance; and

(b) The terms of the plan, agreement or arrangement provide for a periodic rate of finance charge which does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle; provided a minimum finance charge not in excess of 50 cents per month may be imposed, charged or collected.

Subd. 2. Definitions and computations. The definitions and the provisions on computation of percentage rates in the Truth-in-Lending Act, Title I of the Consumer Credit Protection Act, P.L. 90-321,<sup>1</sup> and in Regulation Z of the Board of Governors of the Federal Reserve System adopted pursuant thereto, 12 CFR 226, as in effect on June 5, 1971 shall apply to the terms used in sections 334.16 to 334.18, and computations thereunder.

Laws 1971, c. 877, §1.

MOTION FILED  
JUL 6 1978

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IN THE  
**Supreme Court of the United States**

October Term, 1977

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No. 77-1258

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STATE OF MINNESOTA, BY WARREN SPANNAUS,  
Its Attorney General,

*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,

*Respondent.*

---

No. 77-1265

---

THE MARQUETTE NATIONAL BANK OF MINNE-  
APOLIS,

*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

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MOTION OF THE MINNESOTA AFL-CIO FOR LEAVE TO  
FILE BRIEF AS AMICUS CURIAE

AND

BRIEF OF THE MINNESOTA AFL-CIO, AS AMICUS CURIAE,  
IN SUPPORT OF THE STATE OF MINNESOTA

---

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*Petitioner,*

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*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

---

BRIEF OF THE MINNESOTA AFL-CIO, AS AMICUS CURIAE,  
IN SUPPORT OF THE STATE OF MINNESOTA

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The Minnesota AFL-CIO respectfully moves this Court for leave to file a brief in this case as *amicus curiae* in support of the State of Minnesota. The consent of the attorneys for Petitioners herein has been obtained, but the attorney for Respondent herein refused to consent to the filing of a brief by the Minnesota AFL-CIO as *amicus curiae*.

The applicant, Minnesota AFL-CIO (hereinafter the "State Federation"), is composed of over 184,000 members from various local labor unions throughout the state. One of its purposes as a registered lobbyist is to lobby in the Minnesota legislature for passage of laws that are of benefit to its members. The adoption of Minn. Stat. §48.185 which limits the interest rate allowable on open end loan accounts to 12% was vigorously supported by the State Federation as a consumer protection measure.

The State Federation will be directly affected by this Court's decision in the present case. The Minnesota Supreme Court, relying on a decision of the Court of Appeals for the Eighth Circuit, held that the respondent, First of Omaha Service Corporation, could charge customers in Minnesota which it had solicited for its BankAmericard program the 18% annual interest rate allowed by Nebraska law.

The petitioner herein, the State of Minnesota, will argue that protection of its citizens from usury is a traditional exercise of its police powers, but the discussion of the concerns of a consumer interest group, as is the State Federation, is not likely to be adequate.

The State Federation has an interest in seeing that the Minnesota law which it supported be preserved.

Moreover, it has an interest in preserving a system in which it has legitimate political influence. If the decision of the Court below is not reversed, a law enacted by the Nebraska legislature will determine the interest rates charged to respondent's Minnesota customers. A consumer interest group in Minnesota has no voice in the legislatures of other states. The effect is to deprive the State Federation of a forum in which to advance its members' interests with respect to interest rates charged by out-of-state national banks. Similarly, no such organization in any other state could influence what a Minnesota national bank could assess on loans it makes out of state. Preservation of a system in which state citizens have some voice in local affairs is of utmost concern to the State Federation.

Applicant has no reason to believe that the argument on these points will be expanded and be made complete in this Court. If the State Federation's argument is approved by this Court, the decision of the court below must be reversed.

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IN THE  
**Supreme Court of the United States**

October Term, 1977

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No. 77-1258

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STATE OF MINNESOTA, BY WARREN SPANNAUS,  
Its Attorney General,

*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

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No. 77-1265

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THE MARQUETTE NATIONAL BANK OF MINNE-  
APOLIS,

*Petitioner,*

vs.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA

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BRIEF OF THE MINNESOTA AFL-CIO, AS AMICUS CURIAE,  
IN SUPPORT OF THE STATE OF MINNESOTA

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By leave of the Court, the Minnesota AFL-CIO files this brief as *amicus curiae*.

**THE INTEREST OF THE MINNESOTA AFL-CIO,  
AMICUS CURIAE**

The Minnesota AFL-CIO (hereinafter the "State Federation") will be directly affected by this Court's decision in the present case, as it is a registered lobbyist in the State of Minnesota and supported the enactment of Minn. Stat. §48.185 which limits the annual interest rate on open end loan account arrangements to 12%. If the decision of the court below is not reversed, this law will be ineffective for setting the interest rate charged by national banks which are located in states which allow a higher rate. Moreover, the State Federation will have lost its legitimate political influence concerning a local matter, as usury laws are traditionally the function of state law, and it is powerless to influence the legislation of any other state.

If the decision below is reversed, the efficacy of the State Federation's lobbying on behalf of its members for consumer protection legislation will be preserved.

**QUESTION PRESENTED**

Does Section 85 of the National Bank Act, 12 U.S.C. §85, allow a national bank located in Nebraska to charge an interest rate allowed by Nebraska law but in excess of that allowed by Minnesota law on loans made in Minnesota?

**STATUTES INVOLVED**

The pertinent statutes are:

12 U.S.C. §85 (App. A-19); and  
Minn. Stat. §48.185 (1976) (App. A-20).

**ARGUMENT**

I.

**THE MINNESOTA SUPREME COURT'S INTERPRETATION OF  
SECTION 85 OF THE NATIONAL BANK ACT ADVERSELY  
AFFECTS MINNESOTA CONSUMERS.**

**A. Interpretation of Section 85 Which Allows Out-  
State National Banks to Export Their Interest Rates  
Discriminates Against Local National Banks.**

The Minnesota Supreme Court has ruled that a national bank located in Nebraska may charge its Minnesota credit card customers the interest rate on unpaid accounts allowable under Nebraska law or Minnesota law, whichever is higher. *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, — Minn. —, 262 NW2d 358 (1977) (App. A-1). Nebraska law allows national banks located there to charge one and one-half percent per month on unpaid accounts, Nebr. Rev. Stat. §8-820. Minnesota law allows national banks located there to charge one percent per month on unpaid accounts, Minn. Stat. §48.185. As a result of *Marquette, supra*, national banks located outside of Minnesota but engaged in extending credit in Minnesota are permitted to charge eighteen percent interest per annum while national banks located in Minnesota are permitted to charge only twelve percent interest per annum on similar loans made in Minnesota.

As pointed out *infra*, this result is unsupported either by the language or by the legislative history of Section 85. The impact of the decision, however, is not confined to competitive discrimination against local national banks; Minnesota consumers, credit customers and depositors are also affected, as is the State Federation, which has lobbied intensively for consumer protection, including usury legislation.

**B. The Probable Effect of Such Discrimination Is To Diminish the Availability of Credit to Consumers at Interest Rates Allowed by Minnesota Law.**

While national banks in Minnesota can avoid the adverse impact of the *Marquette* decision, Minnesota consumers, credit customers and depositors cannot. The future policy of local national banks is foreseeable: first, make fewer loans in Minnesota, and second, make arrangements, or become affiliated, with service corporations or national banks located in states allowing higher interest rates. Diminishing availability of credit at interest rates allowed by Minnesota law will result. Increasing credit costs may reduce consumer credit transactions; the reduction in consumer credit expenditures could cause loss of employment opportunities for Minnesota residents. To the extent that local national banks cannot circumvent the Minnesota statute, fewer loans may be made in Minnesota, thus Minnesota residents may find their deposits used to finance growth in other states.

**C. The Ruling Below Deprives Minnesota Consumers of the Protection of the State's Usury Laws With Respect To Any Type of Loan.**

Minnesota has long followed the policy of regulating interest rates to protect its citizenry from excessive credit cost. Money is a commodity; interest charges are a form of rent on its use, but a lender with the money to relieve the wants of a borrower is in a dangerously powerful position. Fear of oppression led to ancient religious prohibitions on exacting interest on loans. Modern usury laws have been enacted for the same humanitarian purpose. The Minnesota Supreme Court has voiced the protective purpose behind the state's usury laws:

As early as 1717 the colony of New York enacted a law against usury with a penalty of treble the value of the money lent. . . .

Our usury statutes are undoubtedly patterned after the provisions of the New York code. They are the result of legislative efforts to curb the practice of extorting from necessitous borrowers excessive rates of interest.

*Blindman v. Industrial Loan and Thrift Corporation*, 197 Minn. 93, 101, 102, 266 N.W. 455, 459 (1936) (Loring, J., dissenting).

Minnesota consumers and the State Federation were instrumental in the adoption of Minnesota's current statutory framework. After *Marquette*, however, consumers are deprived of the protection of Minnesota law limiting interest charges on bank credit cards. Indeed, under the Minnesota Supreme Court's interpretation of Section 85, there is nothing to prevent a non-resident national bank from

exporting the interest rates allowed by its home state on other types of loans, if they happen to be higher than those allowed in Minnesota. This result obtains not because Minnesota law conflicts with federal law, nor because Minnesota has attempted to legislate in favor of its state chartered financial institutions; but because it has attempted to protect its citizens in a fashion in which another state has not. If any state allows an interest rate higher than that allowed by Minnesota, a national bank located in such state may, consistent with the ruling below, charge Minnesotans such higher rate. The protection Minnesota may offer its citizenry is thus reduced to the level of the lowest common denominator. Surely, this result is unattributable to Congress.

Competition alone cannot be relied upon to protect the consumer where money is the commodity being sold. In the sale of this commodity, another dimension is added. That is, the relative risk in measuring the buyer's ability to repay, which is not involved in the sale of other products or services. In buying other products and services, the buyer would select the lowest price. In purchasing or renting money, the seller may not be willing to sell to a particular buyer at the lowest price, because the risk of not being repaid is too high.

Certainly credit is a mainstay of a viable, growing economy; but not credit extended which results in an inordinate amount of repossessions, foreclosures, uncollectible debts, and the disappointments, cost and problems that follow those results. The value judgment as to what should be the highest price for renting money should be left to each state legislature.

**D. This Interpretation of Section 85 Denies Minnesota Consumers and the State Federation The Opportunity To Protect and Advance Their Interests.**

Congress has not attempted to regulate interest rates for each and every type of loan made in the nation. Indeed, the alternative rates of interest allowed a national bank under Section 85, the higher of the state allowed rate or one or five percent above the discount rate in the Federal reserve district, contemplate that interest rates may differ, regionally or locally. Whether this policy of allowing for locally or regionally differing interest rates is constitutionally mandated or the result of Congress' considered judgment is immaterial; under either rationale, the local nature of interest rate limitations is recognized. Yet, after *Marquette*, Minnesota residents, and their registered lobbyists such as the State Federation, can only obliquely affect such matters of local concern. Since Minnesota residents and lobbyists have little influence in other states' legislatures, and since Congress has already indicated its unwillingness to deal with interest rates on a national level, Minnesota residents and the State Federation are, as a practical matter, denied the opportunity to protect and advance their interests with respect to interest rates on loans made by non-resident national banks, regardless of the amount of business transacted in Minnesota by such banks. This result, likewise, could not have been contemplated by Congress in adopting the National Bank Act.



## II.

**SECTION 85, AS EVIDENCED BY ITS LEGISLATIVE HISTORY, IS MEANT TO PROHIBIT STATES FROM DISCRIMINATING AGAINST NATIONAL BANKS IN FAVOR OF LOCAL FINANCIAL INSTITUTIONS, AND SHOULD NOT BE INTERPRETED TO PROVIDE AN ADVANTAGE FOR OUT-OF-STATE NATIONAL BANKS IN COMPETITION WITH LOCAL NATIONAL BANKS.**

**A. The Decision Below Should Be Reversed as it Frustrates the Congressional Purposes of Competitive Equality and State Authority Underlying Section 85.**

The adverse implications of the Minnesota Supreme Court's decision mentioned above will not result if this Court applies an interpretation of Section 85 which is consistent with Congressional intent. When Congress adopted this statute more than one hundred years ago, the activities of a national bank were restricted to one location. *Citizens & Southern National Bank v. Bougas*, — U.S. —, 98 S.Ct. 88 (1977). Although there is no legislative history concerning the precise issue in this case—whether a national bank can charge the interest rate allowed by the state in which it is located wherever it does business—there is convincing evidence that Congress intended national banks be subject to state law with respect to interest rates.

Congressional debates in 1864 centered first on whether one interest rate should be set for all national banks or whether individual states should remain free to control the interest rates of national banks located there. Senator Sherman from Ohio favored a uniform rate of interest, but was overruled on that point. Cong. Globe, 38th Cong.,

1st Sess. 2123 (1864). After it was decided to allow state law to control interest rates, the discussion turned to the fear of discrimination by states against national banks. Senator Sherman stated:

. . . I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its law.

Cong. Globe, *supra*, at 2126. The concern with potential discrimination resulted in the language of the clause of Section 85 which excepts a national bank from the interest rate allowed by the laws of the state where a different rate is limited for state banks. However, no Congressman suggested his intent was to allow one state to adopt a usury law that would be binding on other states. In fact, Senator Trumbull from Illinois stressed the right of each state to establish its own usury law, when he remarked:

This provision [Section 85] of the bill is not an interference with the States, but on the other hand an agreement with the States. It allows the same rate of interest in a state which is allowed by the laws of the State. I think if any good is to arise from these banking institutions [national banks], the law should be so formed that they may be established in all parts of the country; and it is no interference with State authorities, or with the authority of the different states to control this rate of interest. The State of Kansas may do it or the State of Iowa, or the State of Illinois, or any state, and there can be no complaint by the people of these States if it is left to the control of their legislatures . . .

Cong. Globe, *supra*, at 2124. The intent was to leave control of the rates of interest to the separate state legislatures.

One direct effect of the decision below is to deprive the Minnesota legislature of its heretofore unquestioned authority to control certain interest rates. If the decision below is allowed to stand, not only will the action of the Minnesota legislature in drafting and adopting Minnesota Statute §48.185 be completely meaningless, but so will the lobbying activities of the State Federation in favor of the 12% annual interest rate allowed in that state law. The state's control over usury law would be severely limited. Its law would be binding only on national banks located within Minnesota lending money locally, not on national banks from other states which choose to allow a higher rate of interest. The effect of the decision below is to *create* discrimination, contrary to the meaning of Section 85, not between state and national banks, but between out-of-state national banks which can import a higher interest rate and local national banks which are limited to the interest rate set by Minnesota law. As Justice Scott cautioned in his dissent below:

"The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act."

*Marquette National Bank v. First of Omaha Service Corporation*, — Minn. —, 262 N.W.2d 358, 365 (Scott, J., dissenting) (App. A-18).

Because the Congressional intent of competitive equality for national banks and of individual state control over

usury laws would be frustrated by the interpretation rendered by the court below, its decision should be reversed.

**B. The Decisions Upon Which the Minnesota Supreme Court Relied Ignored the Legislative History of Section 85 and Failed to Scrutinize the Implications of Their Interpretations.**

The Eighth Circuit decision in *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977) upon which the Minnesota Supreme Court relied was itself summarily based on the Seventh Circuit decision of *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The Eighth Circuit opinion does not include a discussion of the legislative history of Section 85, the Congressional intent behind the law, or the probable implications of its interpretation. Thus, an analysis of the Seventh Circuit opinion which set the precedent for the law's disputed interpretation is necessary.

The issue presented to the Seventh Circuit was what law governed when an Illinois-located national bank did business in Iowa. The district court felt the permissible rate would be defined by the laws of the state in which the borrower is situated, and since Iowa's Small Loans Act allowed 18% annual interest, the defendant had not charged a usurious rate. The Court granted a motion to dismiss for failure to state a claim upon which relief could be granted and the plaintiff appealed. The Circuit Court affirmed the decision after reaching the same conclusion as the district court. However, that court held that Illinois law controlled based on the plain meaning of Section 85.



The Seventh Circuit decision granted a preferred status to a national bank which permitted it to charge the higher of the interest rates allowed in the state where it is located or in the state where it does business.

The Seventh Circuit interpretation frustrates Congressional intent for the reasons mentioned above. Moreover, that court had less reason to give close scrutiny to its interpretation since both Iowa and Illinois usury laws permitted the 18% annual interest that was charged. In the present case, however, the implication is much clearer. Minnesota's legislature, consumers and national banks will be forced to accept Nebraska's usury law when a national bank located there lends money in Minnesota. The outcome is a shock to common sense and finds no support from the legislative history of Section 85 or from any prior judicial interpretation of that statute.

In an earlier decision, *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969), a different conclusion was reached in a well-reasoned opinion. The federal district court held that a loan made in Louisiana by a New York national bank was governed by Louisiana usury law. Pointing out that national banks are not totally above the state laws, the court found that the purpose of Section 85 is served only by limiting the effect of the section to loans made in the state where the bank is located. Judge Heebe set forth the following reasons:

Otherwise, a national bank located in a state with a very stringent interest rate would be placed at a severe disadvantage when it made loans outside of the state. In such a situation the purpose of the statute—to put national banks on an equal par with the state banks against which they compete—is frustrated if

the national banks are restricted to the interest rate in the states where they are located. On the other hand, we do not think Congress intended this provision to serve as a haven for national banks which, located in states with little or no restrictions as to the interest rate, charge interest on loans made in other states in excess of that allowed by the laws of those states. This, too, would frustrate the congressional purpose of equality between national and state banks regarding the interest rate.

*Meadow Brook National Bank v. Recile*, supra, 302 F. Supp. at 74. Since competitive equality between lenders is the purpose behind the law, the court found its decision was supported by the statute.

In prospect an unusual result could follow an affirmation of the Minnesota Supreme Court's decision. Legislatures of various states may race to see which can provide the most attractive (i.e., high) interest rate for open end credit in an effort to entice national lending institutions to engage in business in that particular state.

The State Federation lobbied vigorously on behalf of its members to have Minn. Stat. §48.185 enacted. It is of the opinion that a 12% annual interest charge on open end accounts is protective consumer legislation. Congress believed that certain control over usury laws should be delegated to the separate states when it enacted Section 85. The two laws are not inconsistent. Rather, the question is which state law should control when Minnesota borrowers are extended credit from an out-of-state national bank. Congress' intent to promote equality between banks and to leave authority to the states will be furthered by a reversal of the decision below. A law which the Min-



nesota legislature adopted under authority reserved for the state and in hopes of protecting its consumers should not be preempted by a Nebraska law, over which it has no control.

### CONCLUSION

For all of the reasons which have been stated, the decision below should be reversed.

Respectfully submitted,

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### APPENDIX

No. 250

Hennepin County

Todd, J.

Concurring specially,

Sheran, C. J.

Dissenting, Scott, J.,

Yetka, J., Wahl, J.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, intervenor,

Respondent.

Endorsed

Filed November 10, 1977

John McCarthy, Clerk

Minnesota Supreme Court

### SYLLABUS

A national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Reversed.

Considered and decided by the court en banc.

## OPINION

TODD, Justice.

The Marquette National Bank of Minneapolis (Marquette) sought to enjoin the First National Bank of Omaha (Omaha Bank) and its wholly-owned subsidiary, First of Omaha Service Corporation (Omaha Service) from issuing BankAmericard credit cards to the State of Minnesota. The Omaha Bank program assessed customers an annual interest rate of 18 percent on unpaid balances of less than \$1,000, to be computed upon the prior month's balance of the individual account. The Minnesota Credit Card Act (Minn. St. 48.185)<sup>1</sup> sets a maximum interest rate of 12 percent per annum with the interest charge to be based on an amount no greater than the average balance of the individual account for the prior month. As a result of procedural actions, Omaha Service remains as the only defendant, but the matter was considered as though the Omaha Bank still remained as a defendant. The district court entered judgment permanently enjoining Omaha Ser-

<sup>1</sup>Minn. St. 48.185 provides in pertinent part: "Subd. 3. A bank or savings bank may collect a periodic rate finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

"Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

"(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank."

vice from soliciting BankAmericard customers on behalf of the Omaha Bank in Minnesota in contravention of the provisions of Minn. St. 48.185. We reverse.

Prior to the hearing on the matter, the parties agreed to a stipulation of facts which provides:

"I.

"The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue \* \* \* BankAmericard credit cards to Minnesota residents who qualify for them.

"II.

"Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

"III.

"Defendant First of Omaha Service Corporation will participate in the system by entering into agree-

ments with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. \* \* \* While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

“IV.

“The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha’s BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. \* \* \*

“V.

“Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder’s BankAmericard credit card, and exchange the

signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant to his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

“VI.

“The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder’s account. Such finance charges are assessed at the rate of 1-1/2% per month on the first \$999.99 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of \$1,000 and more for an annual percentage rate of 12%, \* \* \* [T]he finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month’s total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.



## "VII.

"The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

## "VIII.

"The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815—8-823, —8-825—8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Corporation

contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. §85.

## "IX.

"The plaintiff The Marquette National Bank of Minneapolis ('Marquette') is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

## "X.

"Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. \* \* \*

## "XI.

"Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition a finance

charge equal to 1% per month (12% annual percentage rate). \* \* \* [T]he finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the amount is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance."

The procedural history of this case is significant. Marquette originally commenced an action in Minnesota district court against the Omaha Bank, Omaha Service, and the Credit Bureau of St. Paul, Inc., alleging violations of the Minnesota Credit Card Act (Minn. St. 48.185), and the Minnesota Deceptive Trade Practices Act (Minn. St. 325.772); and seeking money damages and injunctive relief to restrain the defendant from solicitation in Minnesota for defendant's BankAmericard program. Since the Omaha Bank was a national bank, the case was removed to the United States District Court for Minnesota pursuant to 28 USCA, §1441. Marquette thereafter dismissed Omaha Bank as a party defendant, resulting in the case being remanded back to the state district court because of a lack of Federal subject matter jurisdiction.<sup>2</sup> The case then proceeded solely against Omaha Service. However, because

<sup>2</sup>If Marquette had not dismissed the Omaha Bank as a party defendant, the case would have undoubtedly been transferred to the United States District Court for Nebraska since a national bank can only be sued in the forum where it is established. See, *Radzanower v. Touche Ross & Co.* 426 U. S. 148, 96 S. Ct. 1989, 48 L. ed. 2d 540 (1976).

Omaha Service's function is limited to entering into agreements with merchants and local banks, and, since it does not have control over the issuance of credit cards or establishing the rate of finance charge, the case was treated as if the Omaha Bank was still the defendant.

The district court issued a permanent injunction against Omaha Service prohibiting the "solicitation of residents of the State of Minnesota or other activity in connection with \* \* \* the operation of a bank credit card program" which violates Minn. St. 48.185. In issuing the permanent injunction, the court held that while Federal law prevents states from enacting laws which discriminate against classes of lenders, it does not preclude states from discriminating against classes of loans. The principal issue presented on appeal is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state.

National banks are regulated by the United States Congress. The amount of interest which a national bank may charge its customers is governed by 12 USCA, §85, which provides in part:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, *interest at the rate allowed by the laws of the State, territory, or District where the bank is located, \* \* \**" (Italics supplied.)

The application of this section to interstate credit transactions has been recently considered by both the Seventh and Eighth Circuit Courts of Appeals. In *Fisher v. First*

National Bank of Chicago, 538 F. 2d 1284 (7 Cir. 1976), certiorari denied, 429 U.S. 1062, 97 S.Ct. 786, 50 L. ed. 2d 778 (1977), the court addressed a situation in which a national banking association with its principal place of business in Illinois was charging Fisher, an Iowa resident, interest on the unpaid balance of his monthly BankAmericard statement at a rate allowable in Illinois. Fisher brought an action alleging that the Illinois bank was charging usurious interest to Iowa residents under its BankAmericard program. In permitting the Illinois bank to assess Illinois interest rates to Iowa resident users of the credit card, the court of appeals stated (538 F. 2d 1289):

"\* \* \* The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois. If we could stop there and only look at the first portion of §85, we could easily conclude that the 18% per annum rate of interest allowed by the Illinois Revolving Credit Act, Ill. Rev. Stat., ch. 74, §4.2 (1973), governs the rate chargeable by the defendant within Illinois and anywhere else that it might do business. The language is certainly broad enough to bear that interpretation. It refers to the interest on 'any loan or discount made' as being governed by the laws of the single state where the national bank can be located.

"\* \* \* The crux of this case is what law governs when the Chicago-located national banking association does business in another state, here Iowa. \* \* \*

\* \* \* \* \*

"We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa."<sup>3</sup>

After the action against the Illinois bank was in progress, the same plaintiff brought an almost identical action against the First National Bank of Omaha, challenging its right to charge Iowa resident customers of the Omaha BankAmericard program interest rates allowable in Nebraska. In *Fisher v. First National Bank of Omaha*, 548 F. 2d 255, 257 (8 Cir. 1977), the court of appeals, in denying the plaintiff's claim, stated:

<sup>3</sup>But see, *Meadow Brook National Bank v. Recile*, 202 F. Supp. 62, 73 (E. D. La. 1969), in which the court reasoned: "In effect, 12 U.S.C. § 85 provides that a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. The question is whether this was meant to fix the rate of interest on *all* loans made by the bank or merely those loans made in that state. Admittedly, the above quoted language would seem to include all loans made by the bank and not solely those made in the state where the bank is located. \* \* \*

\* \* \* \* \*

"We hold that 12 U.S.C. §85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state."

This reasoning was disapproved by the Seventh Circuit in *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284, 1290 (7 Cir. 1976), certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977): "We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."



"\* \* \* The question is whether under the National Bank Act we are required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa but consummated in Nebraska. \* \* \*

"\* \* \* We are persuaded, however, that it really makes no difference whether the transactions are characterized as being Nebraska transactions or whether they are characterized as Iowa transactions.

"In the very recent case of *Fisher v. First Nat'l Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), it was held that under the provisions of §85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

"We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota,

has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit. By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system.

In reaching a decision to enjoin Omaha Service and, in practical effect, the Omaha Bank from operating their BankAmericard program in Minnesota in violation of §48.185, the district court sought to distinguish the two Fisher cases. In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 USCA, §85, precludes states from discriminating against lenders as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.

The particular section of the National Bank Act under consideration in this case has been in existence for over a

century. Obviously, the ramifications and problems resulting from bank credit card financing could not have been considered by Congress at the time of its adoption. Furthermore, a rather strong argument can be made that credit card financing is not purely banking business even though a bank may administer the program. The original version of the National Bank Act was enacted by Congress to protect national banks from discriminatory economic legislation by individual states in which the various national banks were located. The result of the Federal legislative efforts was to create what has commonly been referred to as a "most favored lender status" for national banks. *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 879 (8 Cir. 1975); *United Missouri Bank of Kansas v. Danforth*, 394 F. Supp. 774, 779 (W.D. Mo. 1975). In the landmark case of *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 21 L. ed. 862 (1874), the laws of Missouri limited the amount of interest chargeable by banks organized under state laws to 8 percent but allowed all other persons in the state to assess a 10-percent interest charge upon credit transactions. Within this statutory scheme a national banking association organized and located in the State of Missouri charged its credit customers a 9-percent interest rate which was alleged to be usurious. In an early interpretation of virtually identical statutory language to that employed in 12 USCA, §85, the Supreme Court held that the National Bank of Missouri could lawfully charge its customers a 10-percent interest rate and reasoned (85 U.S. [18 Wall.] 412, 21 L. ed. 683):

"\* \* \* Coupled with the general spirit of the act, and of all the legislation respecting National banks,

it is controlling. It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the states allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favor-



ites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."

The decisions reached in the Fisher cases injected a new attribute into the "most favored lender status," which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Bank Act.

However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court's order which enjoin Omaha Service from operating the Omaha Bank's BankAmericard program by charging an interest rate in violation of §48.185. Consistent with the reasoning in the Fisher cases, the Omaha Bank may assess an interest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb. Rev. Stat. §8-820.

Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created. A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.

Reversed.

SHERAN, Chief Justice (concurring specially).

I agree with the result. I do not agree that the public suffers by application of the law in this case where users of credit cards now have a choice between competing suppliers.

SCOTT, Justice (dissenting).

I respectfully dissent. The original purpose of 12 USCA, §85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was intended to put "national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders." *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 80 (8 Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The Fisher decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have



rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act.

As the majority opinion states, "The decisions reached in the Fisher cases injected a new attribute into the 'most favored lender status,' which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs." Additionally, should a simple credit card transaction between a local citizen and a local merchant be construed as a bank loan by the Nebraska bank to a Minnesota citizen as Fisher proclaims without question? Minnesota should reject such an extension as a misinterpretation of the National Bank Act<sup>1</sup> and exercise its own judgment. In such matters we are not bound by the Federal circuit court cases but only by holdings of the United States Supreme Court.<sup>2</sup> E.g., *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7 Cir. 1970).

I would therefore affirm the trial court's issuance of the permanent injunction against Omaha Service prohibiting

<sup>1</sup>The trial court, in its order of December 22, 1976, stated: "To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

<sup>2</sup>"While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely the Supreme Court." 1B Moore, *Federal Practice*, Par. 0.402[1], p. 65 (2 ed.).

the solicitation of credit card customers in Minnesota as a violation of Minn. St. 48.185.

YETKA, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

WAHL, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

*12 U.S.C. §85. Rate of interest on loans, discounts and purchases*

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the

case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub. L. 93-501, Title II, §201, 88 Stat. 1558.

*Minn. Stat. 48.185 OPEN END LOAN ACCOUNT ARRANGEMENTS.* Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed \$7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed \$5,000, nor shall it extend such credit for any purposes other than personal, family, or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank;



(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge shall be charged on that balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

(a) that the law of another state shall apply:

(b) that the person consents to the jurisdiction of another state; and

(c) which fixes venue;

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in



the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the requirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.

[1976 c 196 §5]

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JUL 6 1978

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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**No. 77-1258**

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THE STATE OF MINNESOTA, by WARREN SPANNAUS,  
its Attorney General, *Petitioner*,

v.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

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THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,  
*Petitioner*,

v.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

---

**MOTION FOR LEAVE TO FILE  
A BRIEF OF AMICUS CURIAE**

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**BRIEF OF THE  
CONFERENCE OF STATE BANK SUPERVISORS  
AS AMICUS CURIAE**

---

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The Conference of State Bank Supervisors hereby moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. The petitioners have consented to the filing of such a brief. The respondent has refused consent.



The Conference of State Bank Supervisors (Supervisors) is an association founded in 1902 consisting of the officials of state governments responsible for the regulation of state-chartered banking institutions in the 50 states, as well as their counterparts in Puerto Rico, the Virgin Islands, and Guam. As of December 31, 1977, the Conference's members had jurisdiction over 10,550 state-chartered commercial and mutual savings banks with total resources of approximately 670 billion dollars. (See Appendix A).

As more fully set forth in the brief, the state banking system, which the members of the Conference are charged with supervising, will be directly, substantially and adversely affected by the decision of the court below. That decision will place national banks in a clear position of competitive superiority over state banks in the vital area of interest rates—the very crux of the banking business. It permits out-of-state national banks to charge interest rates which a state does not allow for any lender within the state.

The decision in this case will critically affect the state banking system in every state—not just Minnesota. The Conference is in a unique position to bring a nationwide perspective to the resolution of the issue in this case, representing as it does the supervisors of state banking in all the states. The Conference has previously been permitted to appear as *amicus curiae* by this Court in other cases involving the competitive equality of the state and national banking systems. *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968).

The Conference also believes that in dealing with the issue presented to this Court in the petitions for certiorari the Court must reconsider its earlier decision in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873), which held that national banks could charge the interest rates within a state permitted by that state to any lender, even if state banks were not allowed to charge such rates. This issue should be—and has not been—fully presented to this Court. Since the decision below will expand this competitive superiority of national banks by allowing them to export interest rates from one state to another state, the Court should be presented with a diverse, comprehensive discussion of the ramifications of this important question.

For these reasons, the motion for leave to file the attached brief of *amicus curiae* should be granted.

Respectfully submitted,

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July 6, 1978

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

No. 77-1258

THE STATE OF MINNESOTA, by WARREN SPANNAUS,  
its Attorney General, *Petitioner*,

v.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,  
*Petitioner*,

v.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

**BRIEF OF THE  
CONFERENCE OF STATE BANK SUPERVISORS  
AS AMICUS CURIAE**

**INTEREST OF AMICUS CURIAE**

The Conference of State Bank Supervisors respectfully submits this brief as *amicus curiae* in support of Petitioners in this case.

The Conference of State Bank Supervisors (Supervisors) is an association founded in 1902 consisting of the officials of state governments responsible for the regulation of state-chartered banking institutions in the 50 states, as well as their counterparts in Puerto Rico, the Virgin Islands, and Guam. As of December 31, 1977, the Conference's members had jurisdiction over 10,550 state-chartered commercial and mutual savings banks with total resources of approximately \$670 billion. (See Appendix A).

The Board of Directors of the Conference, consisting of state bank supervisors, is the governing body of the Conference under its articles, with authority to supervise the Conference's affairs and determine its policies.<sup>1</sup> The Conference's Board has directed participation in these cases as an *amicus curiae*, subject to permission from this Court.

As officials of the governments of the various states, the Supervisors share the concern of the Petitioner, the State of Minnesota, over the necessity of preserving the integrity of its usury laws in the face of an out-of-state national bank seeking to charge a higher rate of interest than is permitted under state law. The right of a state to protect its citizens from what it considers to be oppressive rates of interest should not be preempted unless federal policy unmistakably so requires.

The Supervisors' interest in this case, however, is broader. It relates to their responsibility for a sound state-chartered banking system able to meet the needs

<sup>1</sup> The Conference invited state-chartered banks and mutual savings banks to become "associate members" in 1958, and there are currently 5,694 such associate members. Representatives from the associate membership advise and assist the Board of Directors, but do not determine policy for the Conference.

of the communities which it serves, and able to compete with national banks within the framework of the dual banking system. This dual system consists of state banks, chartered and regulated by the State Banking Supervisor members of the Conference, and national banks, chartered and regulated by the Comptroller of the Currency under the provisions of the National Bank Act of 1864, as amended.<sup>2</sup> As of December 31, 1977, there were 4,655 national banks with assets in excess of \$655 billion. (See Appendix A).

Although state statutes, governing state banks, and the National Bank Act, governing national banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any state must rest upon an equality in certain basic competitive areas. If one or the other class of banks in a particular state is substantially competitively disadvantaged, such disadvantaged banks will convert to the other system, eventually leaving the dual banking system an empty shell.

Congress, in exercising its power over national banks, resolved this dilemma by establishing a "policy of equalization" between the two classes of banks by giving special weight to the applicability of state law to national banks. *First National Bank of Logan v. Walker Bank & Trust Co.* 385 U.S. 252, 261 (1966); *Lewis v. Fidelity and Deposit Co., of Maryland*, 292 U.S. 559, 565-566 (1934). The preservation of competitive equality between state and national banks is a matter of crucial concern to the State Bank Supervisors, and in its defense the Conference has on a num-

<sup>2</sup> Act of June 3, 1864, ch. 106, 13 Stat. 99, 12 U.S.C. § 21 *et seq.*



ber of occasions filed briefs as *amicus curiae* both with this Court<sup>3</sup> and with lower federal courts.<sup>4</sup>

The cases at bar squarely pose the issue of competitive equality in the critical area of interest rates. Specifically at issue is the question whether, under 12 U.S.C. § 85 and the National Bank Act of 1864,<sup>5</sup> a Nebraska national bank may charge a higher rate of interest in Minnesota than Minnesota permits any lender in that state to charge, including Minnesota national banks. The resolution of this question depends upon this Court's willingness to apply to interstate transactions the rationale of its decision in *Tiffany v. Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873), holding that *in-state* national banks are permitted under 12 U.S.C. § 85 to charge a higher rate of interest than that permitted their competitor state banks by state law.

<sup>3</sup> *E.g.*, *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968).

<sup>4</sup> *Independent Bankers Assn. of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 862 (1976); *Colorado ex rel. State Banking Bd. v. First Nat'l. Bank of Ft. Collins*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *Illinois ex rel. Lignoul v. Continental Illinois Nat'l. Bank and Trust Co.*, 536 F.2d 176 (7th Cir. 1976), *cert. denied*, 429 U.S. 871 (1976); *Virginia ex rel. State Corp. Comm'n v. Farmers & Merchants Nat'l. Bank*, 515 F.2d 154 (4th Cir. 1975), *cert. denied*, 423 U.S. 869 (1975); *Washington Mutual Savings Bank v. Federal Deposit Ins. Corp.*, 482 F.2d 549 (9th Cir. 1973); *Leuthold v. Camp*, 405 F.2d 499 (9th Cir. 1969); *Walker Bank & Trust Co. v. Saxon*, 352 F.2d 90 (10th Cir. 1965), *aff'd. sub. nom.*, 385 U.S. 252 (1966); *Jackson v. First Nat'l. Bank of Valdosta*, 349 F.2d 71 (5th Cir. 1965); and *Whitney Nat'l. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd*, 379 U.S. 411 (1965).

<sup>5</sup> Act of June 3, 1864, ch. 106, § 30, 13 Stat. 108 (1864), as amended, 12 U.S.C. § 85 (1976).

*Tiffany* currently constitutes the most important exception to settled law establishing competitive equality between state and national banks in major areas of banking practice. The Supervisors respectfully submit that this decision should be reexamined as a subsidiary issue to the one posed in this case of whether the *Tiffany* rationale should be extended to interstate transactions.<sup>6</sup>

It may be asked at this point why the right of a national bank to charge a higher rate than a state bank constitutes competitive inequality for state banks within the atmosphere of the highly competitive banking industry. For many years that right, first permitted by this Court in a construction of 12 U.S.C. § 85 and the National Bank Act in the *Tiffany* case in 1873, was indeed a right without practical business significance. But credit conditions and modes have changed enormously from those existing in 1864 when Congress enacted the National Bank Act. Relatively simplistic state "usury" statutes of that era have mushroomed into a multiplicity of state statutes setting forth different finance charge ceilings for new forms of credit vehicles never envisioned a century ago. This phenomenon of non-bank credit vehicles performing specialized services (*e.g.*, credit cards, savings & loans, credit unions, etc.) has coincided with a decade of historically high interest rates which have approached usury ceilings heretofore considerably higher than the interest rates of the market place.

There are, therefore, within each state today wide variations between lower rates which a state bank may

<sup>6</sup> The court below could not, of course, have reexamined and overruled *Tiffany*, a decision of this Court.

charge, and higher rates which may be charged by other lenders and hence, within certain limits, by national banks. Appendices B and C set forth examples of those variations. State banks increasingly find themselves disadvantaged as against their national bank competitors. In some instances, particularly in areas of high risk, high cost loans for which the state has permitted higher interest rates to encourage specialized institutions to reach particularized markets, state banks with their lower interest rate ceilings are precluded from the market as a matter of state policy. Their competitor national banks, however, are permitted to match those rates for other lenders under *Tiffany* which construed Section 85 to permit national banks to charge the highest rate available to any lender in the state (including non-banks), even if state banks are limited to a lower rate. Under *Tiffany* the only way a state can assure state banks competitive equality with national banks is to include state banks within the same rate classification established for other lenders permitted to charge higher rates, even if the state may consider such action to be contrary to its public policy. This result, as this brief will demonstrate, is contrary to the intent of Congress to establish a policy of equalization based upon state law in the major areas of competition between state and national banks.

The interest of the Supervisors may be summarized this way: the ability of state banks to compete with national banks, and hence the vitality of the state chartered banking system, depends in large part upon whether both state and national banks play by the same basic "ground rules" in important competitive areas. The question of the manner in which Congress intended to apply state law regarding interest rates

to national banks is important to the maintenance of competitive equality between national and state banks within the framework of the dual banking system. It is for this reason that the Supervisors seek to appear as *amicus curiae* in this case.

#### SUMMARY OF ARGUMENT

In creating national banks, Congress could have treated the problem of potential competitive inequality in the corporate powers of state and national banks in one of two ways. First, it could have established the powers of national banks without any reference to state law whatever, which would have required 50 state legislatures to monitor closely congressional action and quickly amend their laws relating to state banks in order to maintain parity for state banks with their national bank competitors. Second, Congress could assure through its action that national banks held the same authority as state banks, either through specific deference to state law in the National Bank Act or by declining to occupy the field so as to permit the application to national banks of state laws which do not conflict with federal law.

Congress adopted the second alternative which has been described by this Court as a "policy of equalization" underlying the National Bank Act of 1864 and followed in subsequent amendments to that act. Thus, in *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966), in construing the provisions of Section 36 of the National Bank Act, first enacted in 1927, permitting national banks to branch to the extent permitted state banks by state law,<sup>7</sup> this Court stated:

<sup>7</sup> 44 Stat. 1228 (1927), as amended, 12 U.S.C. § 36(c) (1976).



To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864. See *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 565-566 (1934); *McClellan v. Chipman*, 164 U.S. 347 (1896); *Chase Securities Corp. v. Husband*, 302 U.S. 660 (1938); *Anderson Nat. Bank v. Lockett*, 321 U.S. 233 (1944).

385 U.S. at 261.

This "policy of equalization", frequently enunciated by this Court, stands in direct conflict with the holding below sustaining the right of an out-of-state national bank to charge a higher rate than is permitted under state law to any lender within the state, including state and national banks. It also stands in direct conflict with this Court's decision in the *Tiffany* case in 1873, upon which the Respondent heavily relies, holding that Congress intended a policy of inequality with regard to the interest rates charged by national and state banks *within* a state. The Supervisors contend that *Tiffany* was incorrectly decided and should be overruled. If, however, the Court declines to overrule *Tiffany*, the applicable statutory provision, 12 U.S.C. § 85, should not be interpreted to permit an out-of-state national bank to charge a higher interest rate within a state than that state permits to any of its lenders, including state and national banks.

# I.

In construing the interest rate provisions of the National Bank Act, 12 U.S.C. §§ 85 and 86, the *Tiffany* court was influenced by the fact that it was dealing with a penalty provision, 12 U.S.C. § 86 (twice

interest), and held that a "literal construction" was thereby required. It is difficult, however, to reconcile that approach with the result achieved. 12 U.S.C. § 85 authorized national banks to charge an interest rate allowed by the laws of the state where the bank is located, except that if state law provides a "different" rate for state banks, that rate "shall be allowed" to national banks. That provision could have been construed in accordance with the "policy of equalization" to permit national banks to charge the rate permitted state banks, except in those instances where no rate is specifically prescribed for state banks, national banks may charge the general rate permitted all lenders, including state banks. What the Court did, however, was to read the word "different" so as to mean "higher," thus giving national banks a preferred lender status *vis-a-vis* state banks.

The result the Court reached, therefore, did not rest upon a literal interpretation of the statute. Nor was it required by the 1864 legislative history of 12 U.S.C. § 85 which was not referenced by the Court in its opinion. What did obviously influence the Court was the action taken by Congress in 1865,<sup>\*</sup> a year *after* the National Bank Act of 1864, in placing a prohibitive tax on state bank notes, then the principal source of state bank income.<sup>\*</sup> This led the Court to conclude that "National banks have been National favorites," and to support a preferred lender status

<sup>\*</sup> Act of Mar. 3, 1865, ch. 78, 13 Stat. 484.

<sup>\*</sup> Board of Governors of the Federal Reserve System, *Banking Studies* 45 (1941). See generally, Carson, ed. *Banking & Monetary Studies* (1963); Prochnow, *American Financial Institutions* (1961).



for national banks by reliance on a congressional intent to give "advantage to National banks over their State bank competitors." 85 U.S. 409, 413.

The fact is, however, that the Court's burial of the state banking system was premature. It is true that in 1873 when the Court decided *Tiffany*, the number of state banks was at its nadir, down to 277 from 1,089 in 1864, leading the Court to conclude that they "have been substantially taxed out of existence." *Id.* Nevertheless, state banks revived dramatically due to the development and profitability of deposit banking and by 1892 exceeded the number of national banks.<sup>10</sup> In the *Walker Bank* case, *supra*, this Court recited the decline of state banks because of the 1865 bank-note tax, and their subsequent revival, but nevertheless recognized that congressional intent underlying the National Bank Act of 1864 was the "policy of equalization." Further, as will be noted at pp. 16-24 *infra*, Congress has continued that "policy of equalization" in subsequent amendments to the National Bank Act by specifically adopting state law as the standard for the operations of national banks in a number of important respects.

The Supervisors thus submit that *Tiffany* was erroneously decided. The words of 12 U.S.C. § 85 do not say what *Tiffany* claims it says. While the legislative history is not clearly authoritative one way or the other, it certainly does not require that the words be given the substantially different meaning which the Court gave them by statutory construction (pp. 33-35 *infra*). Of pivotal significance, however, was the fact

<sup>10</sup> *Banking Studies*, *supra* note 9, at 418. (3,773 state banks to 3,759 national banks.)

that the Court was erroneously influenced by the impact of the events of 1865 and the status of the state banking system in 1873, in ascribing an entirely different legislative intent to the National Bank Act of 1864 than was in fact the case. That act, as this Court has held, embraced the "policy of equalization"—a policy Congress has implemented in numerous subsequent amendments to the Act.

The preferred lender status for national banks established by *Tiffany* has come before this Court in only five cases since 1873.<sup>11</sup> Usually it has been within the context of a borrower seeking a double-interest penalty from a national bank for charging the wrong rate, and the issue has been that of ascertaining the state interest rate which the national bank should have charged. Certainly there has never been a reconsideration of the essence of the *Tiffany* decision within the guidelines of the "policy of equalization" subsequently recognized by this Court. Nevertheless, it is significant to note that in one of the subsequent cases before this Court, Justice Pitney, joined by Justices Brandeis and Clarke, did state that "... the purpose of Congress was to place national banks upon a *precise equality* in this respect (interest rates) with banks of issue organized under state laws. . . ." <sup>12</sup> (Emphasis supplied)

<sup>11</sup> *Evans v. Nat'l. Bank of Savannah*, 251 U.S. 108 (1919); *Citizens' Nat'l. Bank of Kansas City v. Donnell*, 195 U.S. 369 (1904); *Daggs v. Phoenix Nat'l. Bank*, 177 U.S. 549 (1900); *Union Nat'l. Bank v. Louisville, New Albany and Chicago Rwy. Co.*, 163 U.S. 325 (1896); *Nat'l. Bank v. Johnson*, 104 U.S. 271 (1881).

<sup>12</sup> *Evans v. Nat'l. Bank of Savannah*, 251 U.S. 108, 117-118 (1919). It might also be noted that some lower courts, although feeling bound by *Tiffany*, have expressed wonder at the *Tiffany* decision. Thus, in *First Nat'l. Bank in Mena v. Nowlin*, 509 F.2d 872, 880 (8th Cir. 1975) the court pointed out that the interpreta-

This case represents the right opportunity to overrule *Tiffany*. That issue is comprised within the question of whether the rationale of *Tiffany* should be applied to interstate transactions. Sup.Ct. R. 23(1)(c).<sup>13</sup> Further, in the absence of "persuasive circumstances," the mere intervening silence of Congress will not prevent this Court from reconsidering an earlier decision. *Boy's Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 242 (1970). See also *Helvering v. Hallock*, 309 U.S. 106 (1940). This is particularly true in the instant case in view of the fact that the practical effect of the competitive inequality created by *Tiffany* has only been recently experienced, and that 12 U.S.C. § 85, as opposed to many other sections of the National Bank Act, has not been the subject of significant congressional interest.

If this Court overrules *Tiffany* and reestablishes the "policy of equalization" underlying the National Bank Act in the matter of interest rates, the holding of the Minnesota Supreme Court that principles of *Tiffany* must be extended to interstate transactions should be reversed.

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tion of the word "different" in 12 U.S.C. § 85 as "higher or lower," rather than just "higher," would have resulted in a situation in which national banks would be paired with state banks even at a different lower state rate than that applicable to most favored lenders.

<sup>13</sup> Of course, the issue of overruling *Tiffany* could not have been considered by the Minnesota Supreme Court below for it was bound by this Court's decision. Nevertheless, the lower court expressed extreme reluctance with the decision it reached in stating, "(T)he granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges." Petition for Certiorari of State of Minnesota, Docket 77-1258, A-15, A-16.

## II.

Even if the Court declines to overrule *Tiffany*, however, the decision below must be reversed as it, and the cases upon which it relies, have improperly interpreted 12 U.S.C. § 85 as applied to transactions by an out-of-state national bank within another state.

The Supreme Court of Minnesota reluctantly reached its conclusion below that national banks doing business in more than one state could charge either the interest rate of their home state or of the state where they were doing business, whichever was higher, on the basis of two decisions of the 7th and 8th Circuit.<sup>14</sup> An examination of these decisions, however, shows that Section 85 of the National Bank Act cannot support this conclusion. First, the 8th Circuit completely misread the holding of the 7th Circuit. In turn, the 7th Circuit interpreted Section 85 on the basis of interpretations of Section 94 of the National Bank Act which antedated this Court's holding regarding that section in *Citizens and Southern National Bank v. Bouslog*, 434 U.S. 35 (1977). That holding destroys the rationale for the 7th Circuit's interpretation of Section 85.

What the 7th Circuit actually held was that a national bank doing business in more than one state was limited, with the exception to be described, to the interest rate prescribed by its home state, the only place that such bank could be "located" under 12 U.S.C. § 85. The exception permitted by the 7th Circuit was that an out-of-state national bank could charge the interest

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<sup>14</sup> *Fisher v. First Nat'l. Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), cert. denied 429 U.S. 1062 (1977); *Fisher v. First Nat'l. Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977).



rate permitted to *state banks* in the state where it was doing business if that interest rate were higher. The 7th Circuit reached this conclusion on the basis of its interpretation of the words "organized or existing" in the except clause of 12 U.S.C. § 85 referring to the interest rates permitted to state banks. The 7th Circuit was heavily influenced by what it held to be the settled interpretation of the words "located" and "established" in the venue provision of the National Bank Act, 12 U.S.C. § 94. This was, however, prior to this Court's more expansive reading of that section in *Citizens and Southern National Bank v. Bougas*, *supra*.

Clearly, in its consideration and adoption of Section 85 of the National Bank Act in 1864, Congress did not contemplate the interstate operation of national banks. The entire debate centered around the question of which rates within a state would be applicable to national banks operating in that state. No one, even the national bank proponents, contemplated that national banks would be allowed to import the interest rate of one state into another state. This not only grants national banks a further competitive superiority over state banks, but even allows an out-of-state national bank to gain a competitive advantage over an in-state national bank, as exemplified by this case. Furthermore, it destroys a state's ability to control the interest rates charged within its borders.

The unfortunate consequences of the decision below, which the Supreme Court of Minnesota recognized, but felt powerless to ameliorate because of the *Fisher* decisions, are not required by 12 U.S.C. § 85. There are at least two more rational interpretations of that section as it applies to interstate transactions, both of which

result in the conclusion that national banks should be governed by the interest rates of the states where they are doing business.

The first alternative interpretation is to assume that indeed a national bank can be "located" in only one state as the 7th Circuit assumed. Under this interpretation, it would be held that when a national bank is doing business in a state where it is not "located," Section 85 does not apply at all and the national bank is governed by the interest rate of the state where it is doing business. This was the interpretation adopted by the court in *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969).<sup>15</sup>

A second interpretation of Section 85, and the one urged by the Supervisors, is that a national bank doing business in more than one state is "located" in those states where it is doing business and is subject to their interest rates with respect to the business transacted within them. This interpretation of Section 85 is in accord with this Court's interpretation of the venue provision of the National Bank Act, 12 U.S.C. § 94, in *Citizens and Southern National Bank v. Bougas*, *supra*, where the Court held that a national bank can be "located" in several different places.

<sup>15</sup> The Supervisors recognize that an order for a new trial was granted in this case. (Brief for Respondent in Opposition to Petitions for Certiorari, p. 11). It is cited here merely to exemplify an alternative interpretation of Section 85.



## ARGUMENT

### I. THE 1873 DECISION OF THIS COURT IN *TIFFANY*, ESTABLISHING A PREFERRED LENDER STATUS FOR NATIONAL BANKS VIS-A-VIS STATE BANKS, WAS INCORRECTLY DECIDED AND SHOULD BE OVERRULED

#### A. *Tiffany* Is Inconsistent With Subsequent Decisions of This Court Holding That in the National Bank Act of 1864, and Subsequent Amendments Thereto, Congress Has Adopted a "Policy of Equalization" Between National and State Banks

In order to place the "policy of equalization" into perspective, a brief history of the banking system of the United States is helpful.

Until 1863 there was only a state banking system, except for the brief periods of the First (1791-1811) and Second (1816-1832) Banks of the United States.<sup>16</sup>

The birth of a system of national banks under the National Bank Act, originally enacted in 1863 and revised in 1864,<sup>17</sup> was engendered by Secretary of Treasury Salmon P. Chase in order to provide a market for government bonds, the source of funds required to finance the Civil War. The system was also designed to replace the highly diversified issues of state bank

<sup>16</sup> In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) Chief Justice Marshall sustained the constitutional authority of Congress to charter the Second Bank of the United States. While recognizing that the establishment of a bank was not among the powers enumerated in the Constitution, *Id.* at 406, he enunciated the doctrine of implied powers and held that a bank could be chartered by Congress as a financial agent of the federal government to assist in the implementation of the federal government's fiscal powers which were specifically granted to Congress by the Constitution.

<sup>17</sup> Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 108.

notes by a sound currency circulating at uniform value throughout the country.<sup>18</sup>

Other than with regard to the issuance of currency, however, it was not contemplated that national banks would operate much differently from state banks. Indeed, the organization of banks under the National Bank Act followed the pattern of the laws of New York, Ohio, and other states, except that certification was required from a federal official, the Comptroller of the Currency who was the head of a newly created Bureau in the Treasury Department.<sup>19</sup>

It was expected that state banks would be attracted to the national banking system and provisions were included in the Act whereby state banks could easily convert to national banks. The anticipated conversions, however, did not take place and as of the end of 1864 there were still only 467 national banks as compared to 1,089 state banks. Frustrated in its effort to adopt a uniform currency, Congress, by a statute in 1865, reenacted in 1866,<sup>20</sup> imposed a tax of 10 per cent on the circulating notes of state banks. While this ended state bank note circulation, it did not end the state bank system which, after a period of decline in numbers, received new vitality from the growth and profitability of deposit banking. By 1892 there were more state than national banks, and state banks have outnumbered national banks since that time.<sup>21</sup>

<sup>18</sup> *Banking Studies*, *supra*, note 9 at 43-44 and other authorities cited in that note.

<sup>19</sup> *Id.* at 45.

<sup>20</sup> Act of Mar. 3, 1865, ch. 78, 13 Stat. 484; Act of July 13, 1866, ch. 184, 14 Stat. 146.

<sup>21</sup> *Banking Studies*, *supra* note 9, at 45-46, 418.

Subsequent congressional legislation made significant changes in the banking system of the United States. The adoption of the elaborate system of monetary controls in the Federal Reserve Act of 1913, and the retirement of notes issued by the national banks in 1935, diminished to the point of extinction whatever special role national banks may have once played as federal instrumentalities in the fiscal operations of the Government.<sup>22</sup> More importantly, the Congress set out to strengthen the authority of national banks which now found themselves at a competitive disadvantage with state banks by reason of the adoption of modern banking codes by many of the States. Congress did so by specifically adopting *state* law as the measure of the authority of national banks in several significant

<sup>22</sup> A cogent marshalling of facts supporting this conclusion is to be found in the dissenting opinion in *First Agricultural Nat'l. Bank v. State Tax Comm'n.*, 392 U.S. 339 (1968), finding that national banks are no longer federal instrumentalities (an issue which the majority did not find necessary to reach to decide the case.) The dissent noted that "national banks under Civil War legislation, to which national banks today trace their history, had important and significant functions concerning currency. . . . All of this was radically changed with the passage of the Federal Reserve Act of 1913, 38 Stat. 251, as amended, 12 U.S.C. § 221 *et seq.* and by subsequent developments with respect to both the Federal Reserve System and to national banks. To capsule those developments greatly, suffice it to say that the Federal Reserve banks (and System) are now the monetary and fiscal agents of the United States. 12 U.S.C. § 391. By 1935, the power of national banks to issue currency had ceased and now Federal Reserve banks are the only banking institutions that can do so." 392 U.S. at 356. The dissent concluded: "Today the national banks perform no significant fiscal services to the Federal Government not performed by their state competitors." *Id.* at 358.

areas of bank operations.<sup>23</sup> In speaking of this development, this Court recently stated:

The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and to build into the federal statute a self-executing provision to accommodate to changes in state regulation.

*First National Bank of Plant City v. Dickinson*, 396 U.S. 122, 133 (1969).

Congressional intent to achieve competitive equality between state and national banks, or the policy of equalization, has been implemented by this Court in three ways.

First, this Court has held that Congress refrained from occupying the field to permit the application of state laws which do not conflict with federal law appli-

<sup>23</sup> Some of the significant instances of the specific adoption of state law in the National Bank Act are as follows: (a) *Branches*. Section 36(c) adopts state law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), *as amended* 12 U.S.C. § 36(c) (1976). (b) *Capitalization*. In certain instances state law is the measure of allowable capitalization of new national banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1976). (c) *Conversions and Mergers*. No conversion of a national bank to a state bank, or its merger with a state bank, may take place "in contravention of the laws of the State in which the national banking association is located." 64 Stat. 456 (1950), 12 U.S.C. § 214(c) (1976). (d) *Fiduciary Powers*. The Comptroller may grant a permit to national banks, "when not in contravention of State or local law," to "act as trustee . . . or in any other fiduciary capacity in which State banks . . . which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." 76 Stat. 668 (1962), 12 U.S.C. § 92 (a) (1976). See also the reservation of powers over bank holding companies and bank subsidiaries. 70 Stat. 138 (1956) 12 U.S.C. § 1846 (1964).



cable to national banks. Thus, in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act authorizing national banks to branch—that a Missouri statute forbidding branch banks was applicable to national banks. Mr. Justice Brandeis in *Lewis v. Fidelity and Deposit Co. of Maryland*, 292 U.S. 559, 566 (1934), reiterated this conclusion in holding that “. . . a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law.”

Second, in construing provisions of federal law applicable to national banks which give deference to state law, this Court has construed the federal statute in a manner designed to assure *full* competitive equality with state banks. Thus, in *Lewis v. Fidelity and Deposit Co. of Maryland*, *supra*, the question was whether a 1930 amendment to the National Bank Act authorizing a national bank to “give security” for state deposits meant merely a pledge of specific assets or a general lien upon the bank’s assets. State banks, competitors of national banks for such deposits, had the right to give the more impressive security of a general lien. This Court held that the language of the federal statute was broad enough to authorize a general lien, and that it should be given that construction because “the main purpose of the 1930 Act was to equalize the position of national and state banks . . . .” *Id.* at 564. Mr. Justice Brandeis concluded as follows:

The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Re-

serve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization. (Citations omitted)

*Id.* 564-565.

Finally, just as the Court has construed provisions of the National Bank Act to assure that national banks would compete fully with state banks, it has construed provisions of the Act in order to assure that *state* banks could also compete fully with national banks. Two important cases involving branching exemplify this point.

In the *Walker Bank* case, *supra*, this Court was called upon to construe Section 36(c) of the National Bank Act, enacted by the McFadden Act of 1927 and the Banking Act of 1933 in order to place national banks on a parity with state banks in the matter of branching. The Court was emphatic in its statement that Congress had intentionally sought to maintain “competitive equality” in branch banking by incorporating state law in the National Bank Act as the standard by which national banks could branch. It went on to state that *all* provisions of state branching law are binding upon national bank branches, and that the Comptroller may not “pick and choose what portion of the law binds him” in authorizing national bank branches. 385 U.S. at 261. This result, the Court concluded, was in accordance with the “policy of equalization first adopted in the National Bank Act of 1864.” *Id.*

Similarly, in construing the provisions of Section 36(f) of the Act defining a “branch,” this Court in *Dickinson*, *supra*, stated that the definition “must not



be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank*." 396 U.S. at 134.

In both *Walker Bank* and *Dickinson*, the Court emphasized the obvious point that it was not called upon to judge the "rightness" or "wrongness" of the banking policies involved. In *Dickinson* it pointed out that many would consider armored car service and deposit receptacles to be a sensible mode of operations, 396 U.S. at 138. But it said in *Dickinson*, for example, that "*Florida's* policy" of restricting armored car service "is not open to judicial review any more than is the congressional policy of 'competitive equality.'" *Id.* (Emphasis supplied.)

It is in the light of the foregoing history of banking and of the banking statutes of the United States, as well as this Court's construction of those statutes in accordance with the policy of equalization, that *Tiffany* must be reexamined. It stands completely isolated in permitting a national bank to charge the highest rate available to any lender in the state, even if state banks are limited to a lower rate. *Tiffany* also stands in distinct opposition to the "policy of equalization" by forcing a state either to permit state banks to charge the highest interest rates of any lender in the state in order that they may compete with national banks, or alternatively, to permit non-bank institutions to charge higher rates in order to develop specialized lending activities at the expense of creating competitive inequity between state and national banks. In almost every other area of banking operations, competitive equality is achieved by requiring national banks to follow state policy applicable to state banks reflected in state law.

When the *Tiffany* Court stated that 12 U.S.C. § 85 was intended to give national banks "at least equal advantages in such competition" with state banks, 85 U.S. at 412, it was on sound ground under the "policy of equalization" and should have stopped there. It went on, however, to speculate that an "unfriendly state might prescribe a rate for state banks so low, that banking could not be carried on by national banks except at a loss." *Id.* Just why states would try to put state banks out of business by a ruinously low interest rate in order to put national banks out of business, is *never* explained or supported in the Court's opinion. Nevertheless, the Court said, national banks must be assured the higher of both state bank and other-than-state-bank rates even if the end result is to permit a national bank a higher rate than a state bank. This result, the Court concluded, was justified because "it accords with the spirit of *all* of the legislation of Congress" (emphasis supplied) which, among other things, has substantially taxed state banks out of existence. It was to exercise "harmony" with this policy of the state banknote tax of 1865 that the *Tiffany* court adopted the preferred lender status which it granted national banks under Section 85 of the National Bank Act of 1864. In that conclusion, constituting the pivotal decisional criteria of the case, the *Tiffany* court erred."

<sup>24</sup> The cases subsequently applying the *Tiffany* doctrine demonstrate the competitive superiority that can result to national banks. Normally, the interest rates applicable to national bank loans must be those applicable to comparable loans under state law although the terms and conditions of the loans need not be identical. *Partain v. First Nat'l. Bank of Montgomery*, 336 F. Supp. 65 (M.D. Ala. 1971), *rev'd on other grounds* 467 F.2d 167 (5th Cir. 1972). For example, in *United Missouri Bank of Kansas City v. Danforth*,

Having established that the *Tiffany* decision was contrary to the underlying intent of Congress to establish a "policy of equalization" in the National Bank Act, attention should now be turned to the specific legislative history of 12 U.S.C. § 85.

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394 F. Supp. 774 (W.D. Mo., 1975), the court held that a national bank could charge the interest rate permitted by the state's Small Loan Act for its credit card transactions, even though the court assumed that such transactions were of a type subject to the state's Retail Credit Sales Act. See also *Acker v. Provident Nat'l. Bank*, 512 F.2d 729 (3rd Cir. 1975) and *Haas v. Pittsburgh Nat'l. Bank*, 526 F.2d 1083 (3rd Cir. 1975).

In *Northway Lanes v. Hackley Union Nat'l. Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972), the court held that a national bank could take interest in advance and charge the borrower closing expenses even though under similar circumstances a state bank would be prohibited from doing so. In *Evans v. Nat'l. Bank of Savannah*, 251 U.S. 108 (1919), this Court held that a national bank in discounting short-time notes in the ordinary course of business may retain an advance charge at the highest rate allowed for interest by state law even though such advance taking would be usurious under state law. The majority claimed that the National Bank Act had adopted state law only insofar as it fixed a numerical rate of interest. In *Citizens' Nat'l. Bank of Kansas City v. Donnell*, 195 U.S. 369 (1904), however, this Court had held that a national bank which compounds interest in a manner prohibited by the state where it does business forfeits all interest even though the total interest charged amounted to less than the maximum rate permitted by the state. Moreover, in *First Nat'l. Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975), the court held that if discounted notes issued by a national bank yielded in excess of the interest rate permitted by Arkansas law, even though the numerical rate was not in excess, this was a usurious rate. The court held that the primary principle of construction of Section 85 is that it adopts the entire case law of the state interpreting the state's limitation on usury and not just the state's numerical rate. The court read *Evans* as a narrow exception to this interpretation for short-term single payment commercial paper.

**B. Neither the Language of Section 85 Nor the Intent of Congress in Adopting It Require the Result Reached in *Tiffany***

1. In its initial consideration of the predecessor of Section 85, the House of Representatives refused to authorize national banks to charge the interest rates permitted to any lender

In 1864, the House Ways and Means Committee reported a bill which would have replaced Section 46 of the National Currency Act of 1863<sup>25</sup> with a new Section 30 establishing a uniform interest limitation of seven per cent for national banks.<sup>26</sup> On March 30, 1864, Congressman Blaine of Maine moved to amend the committee proposal "by striking out the words 'of seven per cent per annum,' and inserting in lieu thereof the words 'established by law in the State where the association is located.'"<sup>27</sup> This reference to the rate *established* by the state where the national bank was located was supported by Congressman Cole of California.<sup>28</sup>

Congressman Price proceeded to offer another amendment which would have pegged the interest rate at "the established rate of interest for delay in the payment of money under contract between the parties

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<sup>25</sup> "That every association may take, reserve, receive, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, such rate of interest or discount as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws of the several States." Act of Feb. 25, 1863, ch. 58, § 46, 12 Stat. 678-79. There does not appear to be any enlightening legislative history on this specific provision.

<sup>26</sup> *Cong. Globe*, 38th Cong., 1st Sess. 1352, 2123 (1864).

<sup>27</sup> *Id.* at 1352.

<sup>28</sup> *Id.* at 1353 (Emphasis added.)



by the laws of the several States in which the associations are respectively located, and no more.'"<sup>29</sup> The House rejected the Price amendment after Congressman Blaine pointed out that the effect would be to give the national banks an advantage by permitting them to charge the same rates as individuals:

I would be opposed especially to [Congress's] interfering so as to raise the rate of interest; and if the gentleman's amendment is adopted, the effect will be that every bank in the Northwest will have just the same facilities for shaving at high rates that individuals *outside the banks* now have. I do not think the Congress of the United States ought to do that thing, and hence I am opposed to the amendment."<sup>30</sup>

The House approved the Blaine amendment, 52 to 41. Further debate then ensued on reconciling the penalty provision of the act with this revised interest rate provision and a proposal of Congressman Blaine in this regard was adopted.<sup>31</sup> Thus, the House refused to adopt a uniform national rate of interest for national banks. It also clearly refused to allow national banks to charge the rate permitted to any lender by the state. It appeared to assume that the provision it did pass would only allow national banks to charge the rate permitted to other banks by the state. These views of the House are significant in understanding the Senate version of Section 30 in which the House later concurred without debate.<sup>32</sup> If

<sup>29</sup> *Id.* at 1352.

<sup>30</sup> *Id.* (Emphasis added.)

<sup>31</sup> *Id.* at 1353-1354.

<sup>32</sup> *Id.* at 2450.

that section permitted national banks to charge the interest rate permitted to any lender, it seems doubtful that the House would have concurred in it without debate since the House had specifically refused to adopt such a measure.

2. The Senate compromise on the interest rate provision of the National Bank Act sought to assure that state banks would not be favored by the States; the intent was not to give national banks competitive advantages

On May 5, 1864, the Senate commenced debate on the interest rate provision reported by the Senate Finance Committee as follows:

The rate allowed by the laws of the State or Territory where the bank is located, and no more. And when no rate is fixed by the laws of the State or Territory, the banks may take, receive, reserve, or charge a rate not exceeding seven per cent."

Senators Grimes of Iowa, Henderson of Missouri, and Doolittle of Wisconsin led the faction which sought to prevent national banks from gaining a competitive advantage over state banks by being able to charge higher interest rates. Consequently, Senator Grimes proposed an alternative amendment, setting interest at "the general rate fixed by the laws of the State or territory where the bank is located." He felt that the deletion of the word "allowed" was necessary to prevent national banks from being able to charge at the rate set by contract between private individuals, when that percentage exceeded the general rate for local banks.<sup>33</sup> He presupposed a rate structure in which the state set a

<sup>33</sup> *Id.* at 2123.

<sup>34</sup> *Id.* at 2124.



general rate with certain limited exceptions, such as for individual transactions. The former rate would be the "established" rate and the latter would be a rate which the state "allowed".

Senator Sherman, a proponent of the national banks, commented that he did not see why privileges of state banks should not also be extended to national banks:

The reason why I am opposed to the amendment of the Senator from Iowa is that if adopted it will continue in existence the State banks that are entitled to the special privilege of taking a *greater* rate of interest than will be conferred by the general law on the national banks.<sup>25</sup>

Thus, the leader of the national bank forces in this instance was concerned with competitive equality with state banks, not competitive superiority. In his opinion, the bill proposed by the Committee on Finance would have the same legal effect as the clause in the 1863 Act referring to the "established rate of interest." Senator Grimes countered that if the term "allowed" was used, a national bank, in Iowa for example, could charge ten per cent since that rate was "allowed" for individuals entering into a private contract, but the "established" rate of interest applicable to local banks was six per cent. Since in Senator Sherman's view there was *no difference* between the legal definitions of "allowed" and "established," he readily agreed to compromise with Grimes by substituting "established" for "allowed." Grimes withdrew his amendment, and the Senate agreed upon Sherman's

<sup>25</sup> *Id.* (Emphasis added.)

amendment to the Finance Committee proposal.<sup>26</sup> Thus, the provision then read in pertinent part:

That every association may take . . . interest at the rate established by the laws of the State or Territory where the bank is located, and no more.

Senator Henderson wanted to know what would be the rate of interest charged *in the state of Missouri* by the national banks in light of this amendment. Did the "rate established" by the laws of the State refer to the six per cent figure which prevailed in the absence of any agreement, the eight per cent rate to which banks of issue were limited, or the ten per cent limit which controlled transactions between private individuals? Henderson urged a modification of the language to read, "the rate established" to be charged by banks of issue under the laws of the State or Territory where the bank is located, and no more." He sought "to allow [national] banks to charge *just exactly* what other banks of issue in the State charge. *I do not want to make any difference between them.*" To cover the case in which the State has no banks of issue, he included the following language in his amendment:

And when no such rate of interest is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding the rate allowed upon special contract between individuals.<sup>27</sup>

<sup>26</sup> *Id.* at 2125.

<sup>27</sup> Although Henderson at first proposed the use of the word "allowed," the amendment as read by the Secretary said "established." *Id.* at 2125-26.

<sup>28</sup> *Id.* at 2126.

Senator Sherman once again voiced his support for the original amendment reported by the Committee. That bill "was intended to confer on these national banks the same privileges that are conferred by the laws of the States on other associations and individuals," and it would "allow those national banks the same rate of interest as is provided for by the local law for the people within their own States." The states could change their laws at any time if they chose. Although Sherman had preferred a uniform rate of interest, he was willing now "to place the national banks in each State on precisely the same footing with individuals and persons doing business in the State by its laws." He announced his intention to move to reconsider the vote on the Grimes amendment.<sup>39</sup>

Senator Grimes was indignant. He retorted that in order to rectify the affront to Iowa state policy that passage of the original bill would represent, a special convening of the legislature, at great expense, would be necessary. In exchange for Sherman's withdrawal of his motion to reconsider the amendment by which "established" had been inserted in place of "allowed," Senator Grimes offered to vote against all the subsequent propositions. Senator Sherman agreed, repeating his opinion that "established" and "allowed" had "precisely the same" legal effect.<sup>40</sup>

After further debate, Senator Fessenden suggested that Congress pass over the amendment for the time being, in the hope that the language might be revised to resolve some of the difficulties which had arisen. But Senator Conness urged that the vote by which "es-

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2126-27.

tablished" had been inserted in place of "allowed" be reconsidered then and there, so that the amendment would stand as it had come from committee. Congress approved the motion to reconsider, so the amendment remained in its original form until Congress could return to it.<sup>41</sup>

On May 7, 1864, the Senate approved without discussion a compromise amendment setting as the interest limitation:

That every association may take . . . interest at the rate *established* by the laws of the State or Territory where the bank is located, and no more, *except that where by the laws of any State a different rate is limited for banks of issue organized under State law, the rate so limited shall be allowed for associations organized in any such State under this act.* And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per cent.<sup>42</sup>

When the House took the amendment up for consideration on May 24, the first line included the word "allowed" rather than "established" without any explanation being given for the difference. By a vote of 67-52, the House approved the amendment without modification<sup>43</sup> and it became law in that form.

The section has undergone various revisions since its 1864 enactment. These revisions occurred in 1878, 1933, 1935, and 1974. They are discussed in more detail

<sup>41</sup> *Id.* at 2127-28.

<sup>42</sup> *Id.* at 2145. (Emphasis added.)

<sup>43</sup> *Id.* at 2450.



later in the brief." Section 85 currently reads as set forth in Appendix D.

The legislative history of Section 85 has been the subject of an extensive comment in the *Iowa Law Review*.<sup>43</sup> That author concludes that the *Tiffany* court misinterpreted the intent of Congress:

The second possible construction is that when the provision refers to a "different" rate limited to state banks, the Senators intended that national banks also be limited to that "different" rate and that they would be so limited whether that rate was *higher* or *lower* than the general rate under state law. This construction of the phrase resembles a genuine compromise. Because national banks could charge the "different" (higher) state bank rate, a state would be unable to discriminate against national banks by having a general rate, purporting to bind national banks, lower than the state bank rate. By the same token, national banks would be denied the advantage of charging a high general rate, or even a high rate "allowed" to some specific group or institution other than state banks, if the state bank were lower, because they would be required to charge the "different" (lower) state bank rate. Thus, the primary objectives of both factions were achieved. State legislatures were precluded from discriminating against national banks, and in no case could national banks charge a higher rate than state banks. Moreover, this construction of section 30 has the manifold advantages of comporting with the realities in the historical record, resting on the most natural in-

<sup>44</sup> See note 55, *infra*.

<sup>45</sup> Comment, *National and State Bank Interest Rates Under the National Bank Act: Preference or Parity?* 58 *Iowa L. Rev.* 1250 (1973).

terpretation of the words in the statute, and conforming with the compromise which must have been intended.<sup>46</sup>

Since the House plainly did not desire to permit national banks to charge the rate permitted to any lender, since a strong Senate faction clearly wanted the national banks limited to the state bank rate, and since one of the main concerns of the Senate supporters of the national banks was that they not be competitively disadvantaged *vis-a-vis* state banks, the Supervisors concur in the above interpretation of the Congressional intent in adopting the predecessor of Section 85. Moreover, this interpretation more nearly comports with the statutory language itself than the interpretation adopted by the *Tiffany* court.

**3. A fair reading of Section 85 supports an interpretation that Congress intended only that national banks have competitive equality with State banks**

It is clear from the foregoing legislative history that Congress did not intend to set nationwide uniform interest rates for national banks and did not do so. Congress recognized that this would prohibit states from controlling interest rates within their boundaries. Further, if in certain areas higher interest rates prevailed, national banks would be precluded from doing business in those areas because it might not be profitable to operate at the lower national rate. Secondly, it is clear that Congress wished to insure that state banks did not have competitive superiority over national banks. The legislative history is less clear, however, on the intent of Congress to limit national

<sup>46</sup> *Id.* at 1257.



banks to the rates permitted to state banks. To permit otherwise, however, is contrary to the policy of equalization underlying the National Bank Act which has been held to govern the relationship between state and national banks. Moreover, the statutory language has to be distorted in order to reach a determination that national banks are not limited to the same interest rates as state banks.

The "except" clause in Section 85 has no purpose if it does not limit national banks to the rates permitted to state banks. The first sentence of Section 85 alone is entirely adequate to permit national banks to match any rate permitted by a state to its lenders, including state banks. The "except" clause must have been intended to limit national banks to any "different rate" permitted to state banks.<sup>47</sup> Under this interpretation, it is not necessary to distort the plain meaning of the word "different," as the Court in *Tiffany* did, by holding that "different" only means "higher". The Court's interpretation also renders the "except" clause superfluous since, by virtue of the first sentence of Section 85, a national bank could match any rate of any lender in the state, including state banks. The obvious purpose of the "except" clause is to *limit* national banks to the rates permitted to state banks if those rates are "different" from those permitted to other lenders. Unless the second clause *restricts* the national banks to the "different" rate of the state banks, even if lower, the phrase is redundant, for under the first clause any rate "allowed" under the laws of the state

<sup>47</sup> There was no debate on the critical "except" proviso, which appeared for the first time in the final version approved by Congress.

would include any rate "allowed" for state banks. The *Tiffany* case requires "different" to be read as "higher," with the "except" clause becoming superfluous. *Tiffany* should be overruled and the principle of competitive equality for national and state banks in the area of interest rates restored.

**C. In the Absence of "Persuasive Circumstances" Not Here Present, the Mere Silence of Congress Concerning *Tiffany* Will Not Prevent This Court From Overruling That Case**

The immediately preceding sections of this brief have established the incorrectness of the *Tiffany* decision in terms of the "policy of equalization" underlying the National Bank Act (pp. 16-24), the legislative history of 12 U.S.C. § 85 itself (pp. 25-33), and a reasonable construction of the specific words of that provision (pp. 33-35).

The question arises, therefore, as to why there was not an effort to secure congressional reversal of a manifestly unfair and incorrect decision. The answer is that the preferred lender status accorded to national banks by *Tiffany* did not have a significant business impact on state banks until relatively recently.<sup>48</sup> The reasons why this was so lie in a complex interplay of newly developed forms of credit, financial institutions, patterns of competition, and relationships between usury ceilings and interest rates generated by the market place. Essentially, however, the explanation lies in the fact that while state usury laws were sim-

<sup>48</sup> One indication of this fact is that there has probably been more litigation in the past 10 years relating to 12 U.S.C. § 85 than in the preceding several decades. See 12 U.S.C.A. § 85 and cases cited there.

plistic at the time of *Tiffany*,<sup>49</sup> they became enormously complex as states selectively increased rate ceilings in an effort to regulate consumer credit.<sup>50</sup> This was so primarily in the high-risk, small loan area,<sup>51</sup> a credit

<sup>49</sup> Laws regulating interest rates in the United States have typically been established by state governments which inherited usury rate ceilings from the British Colonial days. See generally, National Commission on Consumer Finance, *Consumer Credit in the United States* ("NCCF Report") Ch. 6 (1972); S. Homer, *A History of Interest Rates* (1963).

<sup>50</sup> The NCCF Report at 94, using New York as an example, shows the multiplicity of usury laws:

New York has separate statutes regulating instalment loans by commercial banks, loans by industrial banks, bank check-credit plans, revolving charge accounts, motor vehicle instalment sales financing, instalment financing of other goods and services, insurance premium financing, loans by consumer finance companies, and loans by credit unions. The general usury rate is 6 percent, (currently 7½ percent under special rule of the Banking Board), and criminal penalties apply if interest is over 25 percent. But the decreed maximum rates to obtain \$500 of credit, repayable monthly over 12 months, range widely: bank personal and improvement loans, 11.6 percent; industrial banks, 14.5 percent; used cars up to 2 years old, 17.7 percent; used cars over 2 years old, 23.2 percent; small loan companies, 24.8 percent; other goods, 18.0 percent; retail revolving credit 1½ percent on monthly balances up to \$500 and 1 percent monthly on balances in excess of \$500.

Citations omitted. See also Appendices B and C, which set forth state law on just two of many possible examples (consumer or installment loans up to \$1000, and on any type of loan at selected levels of \$300 and \$1000).

<sup>51</sup> The first modern small loan bill was passed in New Jersey in 1914 and such legislation eventually passed in most of the 50 states. NCCF Report at 93. These acts represented the legislative response to the problem of loan sharks and were an effort to replace them with "legitimate" lenders. By raising permissible maximum rates, the legislatures attempted to provide legitimate lenders with the opportunity of making a reasonable profit for the extension of small loans to poor credit risks. Note, *Regulation of Consumer Credit—The Credit Card and the State Legislature*, 73 Yale L.J. 886, 898

field into which banks did not enter for a long time.<sup>52</sup> It was only then that the rate differential for banks and non-banks (which national banks could utilize) could become significant, and did in fact become so as banks, pressed by increased competition and inflationary interest rates bumping interest ceilings, reached out for higher rate opportunities. This is one reason, for example, why banks have been attracted to the recent credit card phenomenon<sup>53</sup> where the consumer appears to pay relatively little attention to the level of interest rates and gives primary weight to service convenience.<sup>54</sup>

(1964). It should be noted, however, that not just consumers were considered in enacting exceptions to usury laws. A host of exceptions to the usury laws were made to accommodate the needs of industry and commerce as well. NCCF Report at 93.

<sup>52</sup> Thus the National City Bank in New York was the first to organize a personal loan department and this was not until 1928. NCCF Report at 93; Kawaja, *The Economics of Statutory Ceilings on Consumer Charges*, 5 Western Econ. J. 157, 161 (1967).

<sup>53</sup> Credit cards were first issued by individual department stores and petroleum companies as sales devices. The Diners' Club card in 1950 was the first issued as an independent source of profit. The coupling of the convenience aspect of monthly billing with a form of installment finance, and the entry of banks into the credit card industry, came later. Note, *supra* note 51, at 73 Yale L.J. 886-89.

<sup>54</sup> This is true even after the passage of the Truth in Lending Act of 1968, 15 U.S.C. § 1601 et seq. See Giles, *The Effect of Usury Law in the Credit Market Place*, 95 Banking L.J. 527, 534-536 (1978), and sources cited. NCCF Report, *supra* note 49, at 191. See also the decision of the court below. (A-35 attached to the petition for certiorari of the State of Minnesota in Docket 77-1258). This is part of a larger phenomenon whereby borrowers generally do not "shop" for loans, although consumers generally do shop for goods. Note, *supra* note 51, at 73 Yale L.J. 892-94. It should also be noted that the cost of credit in credit cards is very high, *id.* at 899, and, therefore, requires a higher rate of interest to achieve creditor profitability.



Because the preferred lender status accorded national banks by *Tiffany* did not become a problem until recently, it is understandable why little or no attention has been paid by Congress to the issue of competitive inequality between state and national banks in 12 U.S.C. § 85. Indeed, to the extent any implications can be drawn from that subsequent history, it supports the view that Congress itself did not read 12 U.S.C. § 85 as *Tiffany* read it.<sup>55</sup> In any event, congressional silence is no bar to a reconsideration of the *Tiffany* construction of 12 U.S.C. § 85. In *Helvering v. Hallock*, 309 U.S. 106 (1940), overruling a prior interpretation of an estate tax provision, Mr. Justice Frankfurter commented extensively on the danger of relying too heavily upon the absence of correcting legislation:

It would require very persuasive circumstances enveloping Congressional silence to debar this

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<sup>55</sup> 12 U.S.C. § 85 has been amended only four times since its original enactment in 1864.

In Section 5197 of the Revised Statutes of 1878, the words "or existing" were added to the except clause. This change, which did not affect intra-state competitive equality between state and national banks, has no legislative history.

In 1933, the "1 per centum" in excess of the Federal Reserve discount rate language was added to the first and second sentences. Act of June 16, 1933, ch. 89, §25, 48 Stat. 191. This language was contained in the original bill drafted by Senator Glass in 1932. S. 4412, 72nd Cong., 1st Sess. § 21 (1932). The clause was explained in the Senate Committee Report as follows: This section "limits the interest that may be charged by a national bank to that which may be charged by local banks in the State where the national bank is located, or to a rate 1 per cent higher than the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the district where the national bank is located, whichever is greater." S. Rep. No. 584, 72nd Cong., 1st Sess. 16 (1932). (emphasis added). The same explanation appeared in the House and Senate Committee reports in 1933, H.R. Rep. No. 150, 73rd Cong., 1st Sess. 4 (1933); S. Rep. No. 77, 73rd Cong., 1st Sess. 17 (1933).

Court from reexamining its own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision

....

... Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications.

309 U.S. at 119-20, 122.

Justice Frankfurter also observed that the fact that Congress had amended *other* provisions of the estate tax law in response to Court decisions did not imply the acceptance of the cases which *Hallock* overruled. 309 U.S. at 120, n.7.

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There was almost no legislative debate over this provision. See 77 Cong. Rec. 3944 (1933). Thus, in 1933 the Congress considered the *only* exception to the applicability of the state bank rate to national banks to be the 1 per cent add-on to the discount rate, an instrument of monetary control. That exception seldom, if ever, has been the effective limit because of the consistently low level at which the discount rate has been set. *Banking Studies*, *supra* note 9, at 454-458.

In 1935, Congress added the third sentence to 12 U.S.C. § 85. Act of Aug. 25, 1935, ch. 614, § 314, 49 Stat. 711. As described by the House Committee report, this addition would "permit national bank branches located outside the States of the United States and the District of Columbia to charge interest at the rate permitted by local law." H.R. Rep. No. 742, 74th Cong., 1st Sess. 19 (1935).

In 1974, the clause "or in the case of business or agricultural loans . . . where the bank is located", was added to the first and second sentences of Section 85 to meet an emergency situation affecting three states. Act of Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558. This exception is not applicable to loans made after July 1, 1977 and was subject to being overridden by subsequent state laws. S. Rep. No. 93-1120, 93rd Cong., 2nd Sess. (1974), reprinted in [1974] U. S. Code Cong. & Ad. News 6249, 6261.



The Court has often cited *Hallock* with approval when it has reconsidered a previous statutory interpretation despite the failure of Congress to modify the statute in question. In *Girouard v. United States*, 328 U.S. 61 (1946), the Court overruled several earlier cases which had said that an alien who refuses to bear arms would not be admitted to citizenship. Even though many efforts to amend the result of the prior cases had died in committee, and Congress had reenacted the applicable statute, the majority declined to infer that Congress had adopted the discredited interpretation:

It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.

328 U.S. at 69-70.

See also *Boy's Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970) (Norris-LaGuardia Act does not bar granting of injunctive relief, overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962); no persuasive circumstances existed to show that legislative inaction was an acceptance of *Sinclair*); *James v. United States*, 366 U.S. 213 (1961) (embezzled money is taxable income under the Internal Revenue Code, overruling *Commissioner v. Wilcox*, 327 U.S. 404 (1946); fact that Congress has remained silent, has reenacted a statute construed by the Court, or has unsuccessfully attempted to amend a statute does not preclude Court from correcting its own errors); *Commissioner v. Estate of Church*, 335 U.S. 632 (1949) (*May v. Heiner*, 281 U.S. 238 (1930), no longer controlling on interpretation of "possession or enjoyment" pro-

vision of § 811(c) of Internal Revenue Code; Congress had not ratified earlier ruling); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47-48 (1950); *FTC v. Dean Foods Co.*, 384 U.S. 597, 609-10 (1966); *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941).

When the Court has occasionally relied on the absence of congressional action to support its reaffirmation of a prior decision, persuasive circumstances, not here involved, were present. Thus, in *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968), the Court held that under 12 U.S.C. § 548 national banks were not subject to the Massachusetts sales tax. Mr. Justice Black stressed that the legislative history of the provision clearly indicated that the statute was intended to prescribe the only way in which states could tax national banks, 392 U.S. at 342-43, and that since the enactment of the statute, Congress had frequently amended § 548 in response to new problems. 392 U.S. at 345-46. "

For the reasons set forth above, the Supervisors respectfully request this Court to overrule *Tiffany* and hence to reverse the decision of the court below which, ultimately, rests upon *Tiffany*. In the event this Court declines to overrule *Tiffany*, however, the court below should be reversed for other reasons, as will now be shown.

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<sup>22</sup> Even with these persuasive circumstances, three of the eight participating justices would have nevertheless overruled the doctrine that national banks were "federal instrumentalities" in the light of radical changes in the banking industry since the National Bank Act. See note 22 *supra*.

**II. REGARDLESS OF WHETHER TIFFANY IS OVERRULED, NEITHER IT NOR SECTION 85 PROVIDES A BASIS FOR ALLOWING NATIONAL BANKS TO CHARGE INTEREST RATES NOT PERMITTED BY THE LAW OF THE STATE WHERE THEY ARE DOING BUSINESS**

The Supreme Court of Minnesota, in a reluctant decision which it felt compelled to reach on the basis of prior decisions of the 7th and 8th Circuit Courts of Appeal, held below that national banks doing business in more than one state could apply the interest rates of their home state or the interest rates of the state where they were doing business, whichever were higher, to transactions in the latter state. This holding is not in accord with the language of Section 85, is not supported by the legislative history and purpose of that section, and is contrary to the principle of competitive equality which has been held to govern the relationship between state and national banks. It further improperly extends the competitive advantage which national banks already enjoy over state banks in the area of interest rates.

**A. The Seventh Circuit *Fisher* Case Reached Its Conclusion Allowing the Interstate Exportation of Interest Rates Largely on the Basis of Prior Constructions of the Venue Provision of the National Bank Act Which Predated This Court's Holding in *Citizens and Southern National Bank v. Bougas***

In *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), cert. denied 429 U.S. 1062 (1977), the issue was whether the interest rate charged by a national bank, with its principal place of business in Chicago, in connection with the use of its bank credit cards by customers in Iowa was governed by the 18% rate fixed by the Illinois Revolving Credit Act, by the 18% rate fixed for Iowa Small Loan Companies, by the 12% rate fixed for Iowa state banks, or by the 9%

rate fixed for persons generally in Iowa. The credit card business was conducted in Iowa with the help of Iowa correspondent state banks.

The District Court in *Fisher* had held that Section 85 did not apply to loans made to borrowers situated in states other than where the national bank is located and that the laws of the state in which the borrower is located applied in such situations—in this case the Iowa 18% rate.

The Court of Appeals held that, based on the first portion of Section 85, the national bank was “located” only in Illinois and that Illinois law governed the rate the bank could charge within Illinois and anywhere else that it might do business. The court felt compelled to reach this conclusion on the basis of previous cases construing “located” and “established” in the venue provision of the National Bank Act, 12 U.S.C. § 94, in a narrow fashion. The court stated:

From our prior discussion in Part II of 12 U.S.C. § 94, the national banking association venue provision, and the *Radzanower* case, there can certainly be no lingering doubt as to the meaning of “where the bank is located.” None of the cases indicate that Congress gave one meaning to “locate” in § 94 and another meaning to the same word in § 85. The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest “allowed by the laws of the State” of Illinois.

538 F.2d at 1289.

Subsequently, however, this Court in *Citizens and Southern National Bank v. Bougas*, 434 US 35 (1977) has given 12 U.S.C. § 94 a more expansive reading and has held that national banks can be “located” in more



than one place.<sup>57</sup> Since the predicate of the 7th Circuit's decision was a narrow reading of the venue provision, it is questionable whether it would reach the same conclusion in light of this Court's holding in the *Citizens and Southern* case.

After reaching this basic determination, the 7th Circuit then discussed the "except" clause of Section 85 and found that since it applied to national banks "organized or existing in any such State", a national bank "existing" in a different state than the state in which it was "located" could alternatively charge the rate limited for state banks in the foreign state.

Thus, the court held that Illinois law applied to all loans made in Illinois or elsewhere, but that if the national bank existed in Iowa and if Iowa allowed *state banks* to charge a higher rate, the national bank could charge such higher rate to customers in Iowa. By this holding, a national bank is placed in the position of being able to charge a higher rate of interest than *any lender* in a state where it is not "located", but where it is doing business, with the proviso that if a *state bank* in the foreign state is permitted a higher rate than the rate permitted in the home state, this higher rate can be charged. Thus, under this decision, a national bank can be placed in a position of competitive superiority to *any lender* in a foreign state where it is doing business. On the other hand, if the foreign state permits lenders, other than state banks, to charge higher rates than the home state of the national bank, the national bank cannot match such rates. This appears to be a particularly tortuous reading of Section 85 and contrary to the rationale followed by this Court in the *Citizens and Southern* case, *supra*.

<sup>57</sup> *Infra*, at 48-49.

#### B. The Eighth Circuit and the Court Below Misconstrued the Holding in the Seventh Circuit *Fisher* Case

The 8th Circuit in *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (1977), in a clear misreading of the 7th Circuit's *Fisher* decision, went even further. The 8th Circuit *Fisher* case involved a national bank, the respondent in this case, which had its principal place of business in Nebraska and which was engaging in the credit card business in Iowa. The court posed the issue as whether it was required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa, but consummated in Nebraska.

The District Court had held that the credit was extended in Nebraska and that Nebraska law should apply. The Court of Appeals held that it made no difference whether the transactions were characterized as Nebraska transactions or Iowa transactions. The court, completely misreading the 7th Circuit *Fisher* case, stated that such case held that if a national bank in one state made a loan in another state in which it is doing business, and if there is a differential between the states, the bank may charge the higher of the two rates.<sup>58</sup> The court did not indulge in any statutory construction to reach this remarkable conclusion. On the basis of this mistaken interpretation of the earlier *Fisher* case, the court held that the national bank could charge the highest permissible Nebraska rate for the same class of loan for loans made in Iowa because the maximum rate allowable in Iowa was no higher than the maximum rate allowable in Nebraska, but if Iowa

<sup>58</sup> As has been previously shown, the 7th Circuit actually held that a national bank is limited to the rates allowed by its home state with the sole exception that if the state where it is doing business allows *state banks* to charge higher rates, it may match such rates.



permitted a higher rate, the national bank would be entitled to charge such higher rate. The court also held that the national bank could charge rates permitted by the Nebraska small loan law, which were prohibited to state banks, because the credit card transactions were a similar type of credit to the loans governed by the small loan law.

The 8th Circuit *Fisher* decision thus placed national banks doing business in more than one state in a position of clear competitive superiority over state banks.

In its decision below, the Supreme Court of Minnesota followed the decision of the 8th Circuit *Fisher* case and held that a national bank may charge its non-resident credit card customers an interest rate on unpaid accounts allowable in the state where it is "located", or the interest rate of the state where it is doing business, whichever is higher.

The Minnesota court adopted the 8th Circuit reading of Section 85 without recognizing that the 8th Circuit itself had significantly misinterpreted the 7th Circuit *Fisher* holding. The court below, however, held that if it were writing on a clean slate, it would hold that interest rates should be applied uniformly to *all banks* doing business in the state since it felt that such reasoning was more consistent with the history and purpose of the National Bank Act. The court recognized that allowing a national bank to transport an interest rate from state to state could give it a distinct advantage in competing with state institutions. Three justices of the Minnesota Supreme Court dissented from its holding and pointed out that this holding also had the effect of putting out-of-state national banks in a position of competitive superiority over in-state national banks.

### C. The Result Reached Below and in the *Fisher* Cases Is Clearly Erroneous

The result reached below and in the *Fisher* cases is clearly an incorrect interpretation of Section 85. Other courts have reached a contrary determination and the language of Section 85 permits an interpretation more consistent with its underlying purpose of not allowing national banks to be subjected to competitive discrimination.

#### 1. Other interpretations of Section 85 are more rational than the one adopted below

In *Meadow Brook National Bank v. Recile*, 302 F.Supp. 62 (E.D. La. 1969), the national bank was "located" in New York and made a loan in Louisiana. The district court held that Section 85 was not applicable to the Louisiana transaction on the theory that its terms governed loans made in the state where the national bank is located. The court held that loans outside the state where the national bank is "located" ought to be governed by the laws of the state where the loan is made. It is not clear from the court's opinion whether the national bank would be limited to the rate permitted state banks or could charge the rates permitted any lender.

In arriving at this interpretation, the court concluded that it was the congressional intent to place national banks on an equal footing with state banks and pointed out that "the courts have strenuously endeavored to effectuate its purpose despite the fact that the language of that section may not clearly and readily yield the result intended by Congress." The court pointed out what the 7th Circuit *Fisher* case did not discuss, namely, that a national bank located in a state

where the interest rate was low would be disadvantaged in making loans elsewhere and, in the reverse situation, would have a competitive advantage if it were limited to the rates permitted by its home state. Of course, the 8th Circuit *Fisher* holding wiped out the former problem by simply holding that a national bank could charge the highest rate of the state where it was "located" or where it was doing business.

Another interpretation of Section 85 which would achieve the congressional intent of competitive equality and be consistent with the statutory language is to hold that the word "located", in light of present day realities, means the place where the bank is doing business.<sup>59</sup> Thus, a national bank doing business in more than one state would be obliged to follow the law of the state where it is doing business with respect to the

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<sup>59</sup> The 8th Circuit and the court below, by holding that national banks can charge the higher interest rate of their home state or the state where the bank is doing business, have also in effect read "located" in the first sentence of Section 85 to embrace more than one state. Since neither court, however, attempts to reconcile its conclusion with the words of the statute, it is impossible to determine how it was concluded that Section 85 permits a national bank to pick and choose which state's interest rates it will follow. As previously noted, the 7th Circuit read the word "located" as limiting the national bank to the interest rate of its home state. The court added the proviso that the "except" clause of Section 85 permitted a national bank to match the interest rate of a state bank in the state where the national bank is doing business if that rate is higher than the home state rate. This conclusion at least attempts to track the statutory language. The 8th Circuit and the court below, on the other hand, do not explain their rationale for concluding that a national bank can charge the higher rate of the state where it is "located" or the state where it is doing business. If a national bank can be "located" in more than one state, which is the implicit assumption of those opinions, then it must be limited by the interest rates of each such state.

business done within that state.<sup>60</sup> The Conference urges this interpretation of Section 85 in order to restore a semblance of competitive equality between state and national banks. This interpretation of Section 85 would also be consistent with other interpretations of the National Bank Act by this Court.

In *Citizens and Southern National Bank v. Bougas*, *supra*, this Court held that a national banks can be "located" in a plurality of places for purposes of Section 94 of the National Bank Act dealing with venue. In that case a suit had been filed in the state court of the county of the branch and not in the court of the different county specified in the bank's charter.<sup>61</sup>

The Court noted that it was not until 1933 that national banks were permitted branches beyond the place named in the charter. The Court thus found that Congress did not contemplate today's banking system when it formulated the 1864 Act; that there are no sure indicators of 1864 congressional intent with respect to a banking system that did not then exist; and that prior to 1933 Congress had no occasion to be concerned with state court venue other than at the place designated in the bank's charter. The Court observed that "there is no enduring rigidity about the word 'lo-

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<sup>60</sup> The Conference recognizes that there might be occasions where it would be difficult to establish where the business is being transacted, but these situations could be governed by traditional conflict of laws principles.

<sup>61</sup> 12 U.S.C. § 94 reads as follows:

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."



cated' " and found that congressional concern about interruption of a national bank's business by compelled production of records for distant litigation evaporated when venue coincided with the location of a branch.

Here too, credit card transactions were completely unforeseen in 1864 when Section 85 was adopted, and banks in one state did not do business to any significant degree in states other than their home state. It is thus difficult to discern any specific congressional intent on the issue now before the Court of what state law applies when a national bank does business in many states. As discussed below, Congress was only concerned in 1864 with the issue of competitive equality among lenders within the same state. It would be entirely consistent with the philosophy of the *Citizens and Southern National Bank* case, *supra*, to adopt an interpretation of "located" in Section 85 which carries out the basic congressional intent in the National Bank Act to achieve competitive equality for state and national banks.

This overriding purpose of the National Bank Act is well illustrated by this Court's decision in *Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900). In that case the state did not "fix" an interest rate, but rather "allowed" any rate. It was argued that since the state did not "fix" a rate, the second sentence of Section 85 applied to national banks and limited their interest rate to 7%.<sup>62</sup> The Court held that this interpretation of Section 85 would discriminate against national banks. The Court relied on the language of the first sentence of Section 85 that national banks could charge the rate "allowed" by state law. The court stated that the word

<sup>62</sup> See Appendix D.

"fixed" in the second sentence must mean "allowed". In effect, this interpretation reads the second sentence out of the statute since, even if a state had no law on interest rates, it would be "allowing" any interest rate. This shows the extent to which this Court has gone to interpret Section 85 in order to achieve its underlying purpose and this philosophy should guide the Court in this case."

**2. The legislative history of Section 85 provides no support for the proposition that national banks can charge out-of-state interest rates within another state**

Obviously, Congress in 1864 could not have foreseen the development of interstate transactions by credit cards and computers which have given rise to this particular problem of statutory interpretation. Congress simply *assumed* that the bank would be "located" in the same State where it does business, and that, therefore, the law of the state in which the transaction took place would apply. Congress probably would have found it unthinkable that a national bank could charge a rate of interest higher than any rate allowed in the state of the transaction.

The positions of the two factions of the debate in Congress were relatively clear. On one side were Senators Grimes, Henderson, Doolittle and their followers who sought to prevent the national associations from

<sup>63</sup> In *Hiatt v. San Francisco Nat'l Bank*, 361 F.2d 504 (9th Cir. 1966), *cert. denied*, 385 U.S. 948 (1966), no rate was fixed by the state for state banks, but a rate was fixed for other lenders. The plaintiff contended that "no" rate was not a "different" rate and, hence, national banks were limited to the rate applicable to other lenders. In order to insure competitive equality, however, the court overrode this literal reading of Section 85 and held that the national bank could charge any rate because state banks could do so.



gaining a competitive advantage over state banks. On the other side were Senators Sherman, Trumbull and others who sought to create a strong system of national banks and who did not want the states to be able to discriminate against the new associations. Neither group, however, even mentioned the possibility that a national bank based in another state could charge *that* state's higher interest rate, thus *completely* evading the local state's usury limitations.

Some of the rebuttals Senator Sherman and others delivered to the Grimes faction would be simply irrelevant if national banks were not restricted to the interest rates of the states where they are doing business. A common theme was that if the states faced a situation in which the state banks were limited to a lower rate than the national banks, the legislature could modify the rate for state banks.<sup>64</sup> But if the national bank's interest rate is determined by *another* state's laws, the state where the transaction took place would lose control entirely of the rates set within its borders. The only way it could achieve competitive equality for its own lenders would be to mirror the laws of another state. Even the supporters of the national banks, therefore, believed that the states would have *some* powers to control national bank rates by altering their own interest limitations.

Proponents of a uniform rate of interest for national banks had warned that to permit the states to control the interest rates of the national banks would cause capital to move from those states with lower interest rates to those with higher yields, mostly the Western

<sup>64</sup> See, e.g., *Cong. Globe*, *supra* note 26, at 2124 (remarks of Mr. Conness).

undeveloped states.<sup>65</sup> This argument assumed that the states would be able to control the interest rate of national banks within their borders. Furthermore, to permit national banks to charge interest at the rate of their home states in transactions all across the country would either provoke a rush of banks to states with higher allowable limits or have a tendency to move the rates of all states to the highest allowable limits of any state.

In the 1864 debates it was assumed that the rate of the state where the national bank was doing business would control. For example:

SENATOR GRIMES: "... [I]n the States of Illinois and Iowa the [National] banks may take ten per cent, under this law on all money transactions, while in the States adjacent they can only take six per cent."<sup>66</sup>

SENATOR TRUMBULL: "This provision of the bill is not an interference with the States, but on the other hand an agreement with the States. It allows the same rate of interest in a State which is allowed by the laws of the State."<sup>67</sup>

SENATOR SUMNER: "[I]f this provision be objectionable to any State let the State fix the rate of interest to be charged within its borders, or let the State adapt itself to the seven per cent, fixed here in the absence of a State regulation."<sup>68</sup>

SENATOR SHERMAN: "The State of Iowa has it in her power at any time to repeal this exemption in

<sup>65</sup> See, e.g., *Id.* at 1353 (remarks of Mr. Stevens).

<sup>66</sup> *Id.* at 2123.

<sup>67</sup> *Id.* at 2124.

<sup>68</sup> *Id.*

favor of the State banks; but while those banks are organized and exist there, and have the privilege of receiving eight per cent interest, I do not see any reason why the same privilege should not be extended to the national banks."\*

When Congress last amended Section 85 in 1974 to permit a limited exception to the applicability of state law to the interest rates of national banks in what was deemed to be an emergency situation applicable to only three states, it made the exception of a limited duration and subject to being overridden by subsequently adopted state laws, whichever should first occur. The legislative history made it clear that this limited exception did not reflect a federal policy of overriding state law in this area. 1974 U.S. Code Cong. & Ad. News, pp. 6249, 6261. Thus, Congress has only recently reaffirmed its intent that a state's laws govern the interest rates charged within its borders by national banks, as well as other lenders.

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\* *Id.*

### CONCLUSION

The Supervisors urge that *Tiffany* was incorrectly decided, that it should be overruled, and that this Court should hold that national banks are limited to the rates of interest permitted to state banks by the laws of the states where the national banks are doing business. If, however, the Court declines to overrule *Tiffany*, it should hold that 12 U.S.C. § 85 does not permit out-of-state national banks to charge a higher interest rate within a state than that state allows any of its lenders to charge, including state and national banks. In either case, the judgment of the Supreme Court of Minnesota must be reversed.

Respectfully submitted,

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July 6, 1978

## **APPENDIX**



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**APPENDIX A**

**THE DUAL BANKING SYSTEM**

(as of December 31, 1977)

	<u>Number of banks</u>	<u>Per cent all banks</u>	<u>Total assets (000,000)</u>	<u>Per cent all assets</u>
<b>State Banks</b>				
Commercial	10,083	66.3%	\$ 521,292	39.4%
Mutual	467	3.1	147,329	11.1
Total	<u>10,550</u>	<u>69.4</u>	<u>668,621</u>	<u>50.5</u>
<b>National Banks</b>	4,655	30.6	655,316	49.5
<b>All Banks</b>	<u>15,205</u>	<u>100.0</u>	<u>1,323,937</u>	<u>100.0</u>
<b>State Banks</b>				
Commercial:				
Federal Reserve				
Members	1,014	10.1%	\$ 210,441	40.4%
Insured Non-				
members	8,743	86.7	271,929	52.2
Non-Insured	326	3.2	38,921	7.4
Total	<u>10,083</u>	<u>100.0</u>	<u>521,292</u>	<u>100.0</u>
<b>Mutual Savings Banks</b>	467		147,329	
<b>Total</b>	<u>10,550</u>		<u>668,621</u>	

## APPENDIX B

MAXIMUM INTEREST RATES PERMITTED TO ANY LENDER AND TO STATE-CHARTERED  
BANKS ON CONSUMER LOANS OR INSTALMENT LOANS UP TO \$1,000

State	Maximum any other lender	Maximum state-chartered banks
Alabama	3% to \$200, 2% to \$300; add-on: 15% per year to \$500 and 10% to \$1,000	Same as other
Alaska	3% to \$400, 2% to \$800	6% per year discount
Arizona	3% to \$300, 2% to \$600, 1½% to \$1,500	8% per year add-on
California	2½% to \$225, 2% to \$625, 1½% to \$1,650	Banks exempt
Colorado	36% per year to \$300, 21% to \$1,000	Same as other
Connecticut	Add-on: 17% per year to \$300, 11% to \$5,000	Banks exempt
Delaware	9% per year discount	9% per year discount
Florida	30% per year to \$500, 24% to \$1,000	6% per year discount
Georgia	8% per year discount	7% per year add-on
Hawaii	3½% to \$100, 2½% to \$300; over \$300, 12% per year discount	12% per year discount
Idaho	36% per year to \$480, 21% to \$1,600	Same as other
Illinois	2½% to \$300, 2% to \$600, 1½% to \$1,500	7% per year add-on
Indiana	36% per year to \$390, 21% to \$1,300	Same as other
Iowa	3% to \$250, 2% to \$400, 1½% to \$1,000	15% per year
Kansas	36% per year to \$300, 21% to \$1,000	18% per year
Kentucky	3% to \$500, 2% to \$1,200	6% per year discount
Louisiana	36% per year to \$800	Same as other
Maine	30% per year to \$390, 21% to \$1,300	Same as other
Maryland	2¾% to \$300, 2% to \$500, 1¼% to \$1,200	18% per year
Massachusetts	18% per year	Same as other
Michigan	2½% to \$400, 1¼% to \$1,500	7% per year add-on
Minnesota	2¾% to \$300, 1½% to \$500, 1¼% to \$1,200	12% per year
Mississippi	36% per year to \$600, 33% to \$1,800	8% per year add-on

State	Maximum any other lender	Maximum state-chartered banks
Missouri	15% per year to \$500, 10% on excess	Same as other
Montana	Add on: 20% per year to \$300, 16% to \$500, 12% to \$1,000	Discount: 11% to \$300, 9% to \$1,000
Nebraska	30% per year to \$300, 24% to \$500, 18% to \$1,000	18% per year
Nevada	36% per year to \$300, 21% to \$1,000	Discount: 8% per year to \$500, 7% on excess
New Hampshire	2% to \$600, 1½% to \$1,500	1½% per month
New Jersey	24% per year to \$500, 22% to \$1,500	12% per year
New Mexico	3% to \$150, 2½% to \$300, 1% to \$2,500	7% per year add-on
New York	2½% to \$100, 2% to \$300, 1½% to \$900	6% per year discount
North Carolina	3% to \$300, 1½% to \$1,500; 15% per year add-on to \$500	15% per year
North Dakota	2½% to \$250, 2% to \$500, 1¾% to \$750	12% per year
Ohio	Add-on: 16% per year to \$750, 11% to \$1,500	8% per year discount
Oklahoma	30% per year to \$300, 21% to \$1,000	Same as other
Oregon	3% to \$300, 1¾% to \$1,000	15% per year
Pennsylvania	9½% per year discount	6% per year discount
Rhode Island	3% to \$300, 2½% to \$800	21% per year
South Carolina	36% per year to \$300, 21% to \$1,000	7% per year add-on
South Dakota	2½% to \$300, 2% to \$1,000	8% per year add-on
Tennessee	7½% per year discount	6% per year discount
Texas	Add-on: 18% per year to \$300, 8% to \$2,500	Same as other
Utah	36% per year to \$480, 21% to \$1,600	Same as other
Vermont	14% per year add-on	6% per year discount
Virginia	2½% to \$500; 13% per year add-on to \$1,000	7% per year add-on
Washington	2½% to \$500, 1½% to \$1,000	12% per year simple
West Virginia	36% per year to \$200, 24% to \$600, 18% to \$1,200	6% per year discount
Wisconsin	18% per year	18% per year to \$500, 12% on excess
Wyoming	36% per year to \$300, 21% to \$1,000	Same as other

Source: National Consumer Finance Association, *Summary of State Consumer Credit Laws and Rates*, April 1978.

## APPENDIX C

MAXIMUM INTEREST RATES PERMITTED TO ANY LENDER AND TO STATE-CHARTERED  
BANKS ON ANY TYPE OF LOAN IN AMOUNTS OF \$300 AND \$1,000<sup>1</sup>

State	\$300		\$1,000	
	Maximum any other lender	Maximum state-chartered banks	Maximum any other lender	Maximum state-chartered banks
Alabama	2% per mo	2% per mo	1½% per mo	1½% per mo
Alaska	3% per mo	1½% per mo	1½% per mo	1½% per mo
Arizona	3% per mo	1½% per mo	1½% per mo	1½% per mo
California	2% per mo	"	1½% per mo	"
Colorado	36% per yr	36% per yr	21% per yr	21% per yr
Connecticut	17% per yr add-on	"	11% per yr add-on	"
Delaware	1½% per mo	1½% per mo	9% per yr discount	1% per mo
Florida	30% per yr	1½% per mo	24% per yr	1½% per mo
Georgia	1½% per mo	1½% per mo	1½% per mo	1½% per mo
Hawaii	2½% per mo	12% per yr discount	12% per yr discount	12% per yr discount
Idaho	36% per yr	36% per yr	21% per yr	21% per yr
Illinois	2½% per mo	1½% per mo	1½% per mo	1½% per mo
Indiana	36% per yr	36% per yr	21% per yr	21% per yr
Iowa	3% per mo	1½% per mo	1½% per mo	1¼% per mo
Kansas	36% per yr	18% per yr	21% per yr	18% per yr
Kentucky	3% per mo	1½% per mo	2% per mo	1½% per mo
Louisiana	36% per yr	36% per yr	27% per yr	27% per yr
Maine	30% per yr	30% per yr	21% per yr	21% per yr
Maryland	2¾% per mo	1½% per mo	1¼% per mo	18% per yr
Massachusetts	18% per yr	18% per yr	18% per yr	18% per yr
Michigan	2½% per mo	1½% per mo	1.7% per mo	1½% per mo
Minnesota	2¾% per mo	1% per mo	1¼% per mo	1% per mo
Mississippi	36% per yr	1½% per mo	33% per yr	1¼% per mo
Missouri	15% per yr	15% per yr	10% per yr	10% per yr
Montana	20% per yr add-on	11% per yr discount	12% per yr add-on	9% per yr discount
Nebraska	30% per yr	18% per yr	18% per yr	18% per yr

State	\$300		\$1,000	
	Maximum any other lender	Maximum state-chartered banks	Maximum any other lender	Maximum state-chartered banks
Nevada	36% per yr	1.8% per mo	21% per yr	1.8% per mo
New Hampshire	2% per mo	1½% per mo	1½% per mo	1½% per mo
New Jersey	24% per yr	15% per yr	22% per yr	15% per yr
New Mexico	2½% per mo	1½% per mo	1% per mo	1% per mo
New York	2% per mo	1½% per mo	1¼% per mo	1% per mo
North Carolina	3% per mo	1½% per mo	1½% per mo	1½% per mo
North Dakota	2½% per mo	1½% per mo	1½% per mo	1½% per mo
Ohio	16% per yr add-on	1½% per mo	11% per yr add-on	8% per yr discount
Oklahoma	30% per yr	30% per yr	21% per yr	21% per yr
Oregon	3% per mo	15% per yr	1¾% per mo	15% per yr
Pennsylvania	2% per mo	1% per mo	2% per mo	1% per mo
Rhode Island	3% per mo	21% per yr	2% per mo	21% per yr
South Carolina	36% per yr	1½% per mo	21% per yr	1½% per mo
South Dakota	2½% per mo	2% per mo	2% per mo	1½% per mo
Tennessee	1½% per mo	1½% per mo	1½% per mo	1½% per mo
Texas	18% per yr add-on	18% per yr add-on	8% per yr add-on	8% per yr add-on
Utah	36% per yr	36% per yr	21% per yr	21% per yr
Vermont	14% per yr add-on	1½% per mo	14% per yr add-on	1% per mo
Virginia	2½% per mo	1½% per mo	13% per yr add-on	1½% per mo
Washington	2½% per mo	12% per yr (simple)	1½% per mo	12% per yr (simple)
West Virginia	36% per yr	1½% per mo	18% per yr	1% per mo
Wisconsin	18% per yr	18% per yr	9½% per yr discount	12% per yr
Wyoming	36% per yr	36% per yr	21% per yr	21% per yr

<sup>1</sup> Some states permit an additional charge or fee, but these are not included herein.

<sup>2</sup> Banks are exempt from the general usury law; however, they are limited to 1½% per mo. up to \$1,000 and 1% on excess for revolving credit.

<sup>3</sup> Banks are exempt from the general usury law; however, they are limited to 15% per year on revolving credit.

Source: National Consumer Finance Association, *Summary of State Consumer Credit Laws and Rates*, April 1978.

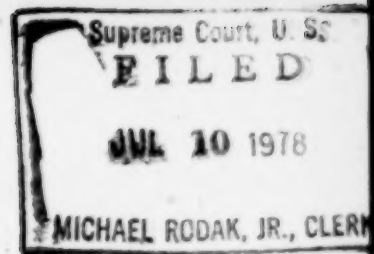


**APPENDIX D****Section 85 of the National Bank Act  
12 U.S.C. § 85**

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, [or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located,] whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, [or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located,] whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest

or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Note: The bracketed material was added by Pub. L. 93-501, October 29, 1974. It is not applicable after July 1, 1977. See 1974 U.S. Code Cong. and Adm. News, pp. 6249, 6259.



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

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NO. 77-1258

---

THE STATE OF MINNESOTA, by WARREN SPANNAUS, its  
Attorney General,

Petitioner

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent

---

NO. 77-1265

---

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent.

---

AMICUS CURIAE BRIEF ON BEHALF  
OF THE STATE OF IOWA

---

## INTEREST OF THE AMICUS CURIAE

The State of Iowa at the present time is a party to a case pending in the Iowa Supreme Court, Civil Appeal No. 61053, entitled *State of Iowa ex rel Richard C. Turner, Attorney General v. First of Omaha Service Corporation, et al.* Final arguments have been made in that case and the decision of the Iowa Supreme Court is awaited. The facts of that case are very similar to the facts in the present case. The State of Iowa is very interested in the present case because any decision rendered by this court will have a great bearing on the Iowa case.

The State of Iowa therefore files this Amicus Curiae Brief in support of the position of the State of Minnesota and the Marquette National Bank of Minneapolis.

## ARGUMENT

### I.

The leading Supreme Court case on interest rates that can be charged by national banks is *Tiffany v. National Bank of Missouri*, 85 U.S. 409, 21 L.Ed. 862, (1873).

The present case gives this court an opportunity to re-examine and clarify the law in this area.

There are two basic questions that must be answered. The first question comes up in the situation where a state provides one interest rate for bank loans and a different higher interest rate for some other kind of lender. In *Tiffany* the court held that a national bank had the choice of charging the interest rate allowed to state banks or to any other interest rate allowed to lenders. This holding gave rise to what has come to be known as the "most favored lender doctrine" and has been expanded by lower courts even further.



The plaintiff believes that the court in *Tiffany* misinterpreted the relevant sections of law. The statement made by the court to justify its position will not stand scrutiny.

The *Tiffany* court stated in essence in 85 U.S. at pages 411 and 412 that if national banks were not allowed to charge a higher rate than state banks, where other lenders were allowed to charge that rate, states could in effect discriminate against national banks and put them out of business. This argument will not stand up to a commonsense analysis. Presumably, if national banks were not able to do business at the rate allowed state banks, then the state banks would not be able to do business either. It is extremely unlikely that the legislatures would pass laws so strict that state banks would not be able to do business. On the other hand if the laws are such that state banks are able to do business, then national banks should be able to successfully conduct their business.

The State of Iowa agrees with a discussion of this question found in 58 Iowa L.Rev. 1240 (1973) where after a lengthy analysis of the legislative history of 12 U.S.C. § 85, the author concludes that the *Tiffany* court misinterpreted this section. The intent of the statute was to limit national banks to the general interest rate of a particular state unless a *different* rate was allowed for state banks. The State of Iowa believes that the "different" rate might be either a higher or lower rate and not just a higher rate as the *Tiffany* court presumed.

There is no rational reason at the present time, and the State of Iowa doubts that there ever was, for allowing a national bank to charge a rate higher than allowed to state banks. A commonsense reading of the statute shows that national banks were intended to be limited by the same laws as state banks.

## II.

The second question that is presented in this case is the question of what interest rate may a national bank with its main place of business in one state charge when making loans to residents of a different state.

The Minnesota Supreme Court, very reluctantly, and because it felt itself bound by *Fisher v. The First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976) and *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977), held that a national bank with its principal place of business in Nebraska could charge the same rate in making a loan to a resident of Minnesota that it could charge in making a loan to a resident of Nebraska. Under the *Fisher* cases, it should also be pointed out that if Minnesota allowed its state banks to charge a higher rate than Nebraska allowed its lenders, then a Nebraska national bank making loans to Minnesota residents would be allowed to charge the same rate that Minnesota state banks could charge.

In this brief, the question of what a Nebraska national bank can charge a Minnesota resident will be examined from two points of view. The first point of view will be on the assumption that a Nebraska national bank would be limited to the rate of interest that a Nebraska state bank could charge. Secondly, the question will be examined assuming that the most favored lender doctrine is valid and that a Nebraska national bank would be allowed to charge a Nebraska resident the interest rate allowed to any other lender in the State of Nebraska in making that particular kind of loan to that particular classification of borrower.

If it is determined that Nebraska national banks are limited

by the same laws that limit state banks in the collection of interest rates then a Nebraska national bank making loans to Minnesota residents would only be able to charge the rate that could be charged by Nebraska state banks. However, if national banks are allowed to charge the rate of the most favored lender, then a Nebraska national bank would be allowed to charge the rate allowed to the most favored lender located in Nebraska in making loans to Minnesota residents.

If a Nebraska national bank is only allowed to charge the interest rate that a state bank could charge in making a given kind of loan to a given customer then the question becomes whether in making loans to Minnesota residents a Nebraska state bank would be allowed to charge the rate allowed in making loans to residents of Nebraska or the rate allowed by Minnesota to lenders making loans to Minnesota residents. In other words would a Nebraska state bank be allowed to charge a Minnesota resident the rate it could charge a Nebraska resident or would it be limited to charging the rate that Minnesota allows lenders to charge when making loans to Minnesota residents.

The pertinent Minnesota law in this regard is Minn. St. 48.185 which provides:

"Subd. 6. This section shall apply to all open-end credit transactions of a bank or savings bank in extending credit under an open-end loan account or other open-end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods,

services, and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open-end credit arrangement specifying;

- (a) That the law of another state shall apply;
- (b) That the person consents to the jurisdiction of another state; and
- (c) Which fixes venue; is invalid with respect to open-end credit transactions to which this section applies."

This section clearly applies to out-of-state banks entering into open-end credit arrangements with Minnesota residents.

The constitutionality of such provisions has been upheld in *Aldens, Inc., v. Packel*, 524 F.2d 38, (3rd Cir. 1975) Cert. Den. 425 U.S. 943, 48 L.Ed 187, 96 Sct. 1684 (1976) and in *Aldens, Inc., v. LaFollette*, 552 F.2d 745, (7th Cir. 1977).

Those cases both involved factual situations where the involvement of the seller, Aldens, with the states was even less than that of First of Omaha Service Corporation and the Omaha Bank. Aldens is a mail order house selling merchandise solely through the mail. Even so, Pennsylvania and Wisconsin laws requiring Aldens to adhere to their interest rate limitation statutes were upheld.

It is clear, then, that a Nebraska state bank making a credit card loan to a Minnesota resident would be allowed to charge no more than the rates allowed by Minnesota law. This rate, of course, is 1 percent per month plus an annual charge not to exceed \$15.

The State of Iowa believes that it is clear that this is the rate that should apply to a national bank located in Nebraska rather than the rate that a Nebraska state bank would be allowed to charge a Nebraska resident.

Even if we concede the validity of the most favored lender doctrine, which we do not, the same result occurs.

If there are other Nebraska lenders who would be allowed to charge a higher interest rate than a Nebraska state bank in making loans to Nebraska residents then, if the most favored lender doctrine is correct, a Nebraska national bank making those kinds of loans to Nebraska residents would be allowed to charge that higher rate. However, it is clear that a Nebraska lender other than a state bank, in making loan to Minnesota residents would still be subject to 48.185, subdivision 6. Therefore, a national bank should be subject to the same provisions.

The basis even of the most favored lender doctrine is to allow national banks so-called competitive equality in the market place. The theory of the most favored lender doctrine is that if there is some other lender other than a state bank that is allowed to charge higher interest rates than the state bank, then in order to obtain competitive equality the national bank should be allowed to do so also. However, this reasoning and purpose does not apply when a loan is made to a resident of another state. Competitive equality does not come into play if the other Nebraska non-national bank lenders would not be able to charge the higher interest rate in making loans to residents of other states such as Minnesota. Competitive equality would require one to examine the rate that other lenders can charge in making loans to Minnesota residents. The national bank should then be allowed to charge that rate but not a higher rate.

If the national bank is required to adhere to the Minnesota law then it has absolute equality with other lenders competing in the Minnesota market.

It makes no sense at all to allow a Nebraska national bank to charge Minnesota residents a rate that no other lender whether state or national or whether located in Nebraska or Minnesota would be allowed to charge in making similar loans to Minnesota residents.

If Nebraska national banks can charge a higher rate than anyone else, then they do not have equality but superiority. It is hard to imagine that any rational person could argue that congress intended to give national banks complete superiority over any other lender. This flies in the face of all of the legislative history of the National Banking Act.



**CONCLUSION**

In order to actually preserve competitive equality the Minnesota Supreme Court should be reversed and instructed to grant the injunction prayed for by the State of Minnesota. To allow the Minnesota Supreme Court's ruling to stand will result in a gross injustice not only in Minnesota but in many other states, such as Iowa, where outside national banks are seeking to charge higher interest rates than allowed by the state where the borrower resides. The Minnesota Supreme Court's ruling will go a long way toward depriving the states of their right, under their police power, to set limits on interest rates that can be charged to their citizens. This right has traditionally been left to the states and should remain there.

Dated July 6, 1978.

Respectfully submitted,

**RICHARD C. TURNER**  
Attorney General of Iowa

BY: \_\_\_\_\_  
**JULIAN B. GARRETT**  
Assistant Attorney General

**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on 7-6, 19 78.

*Richard C. Turner*  
*Attorney General of Iowa*

*s/ Julian B. Garrett*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

Supreme Court, U. S.  
**FILED**  
AUG 1 1978  
MICHAEL RODAK, JR., CLERK

**No. 77-1258**

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On a Writ of Certiorari to the  
Supreme Court of Minnesota

**MOTION OF THE CONSUMER BANKERS  
ASSOCIATION FOR LEAVE TO FILE A BRIEF OF  
AMICUS CURIAE**

and

**BRIEF OF THE CONSUMER BANKERS  
ASSOCIATION AS AMICUS CURIAE**

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---

**MOTION OF THE CONSUMER BANKERS  
ASSOCIATION FOR LEAVE TO FILE A BRIEF OF  
AMICUS CURIAE**

The Consumer Bankers Association ("The Association") respectfully moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached

brief as *amicus curiae*. In accordance with the provisions of that Rule, The Association has sought the consent of the parties for leave to file as *amicus*. The Respondent has provided its consent. However, the Petitioner Marquette National Bank has refused to consent, and the Petitioner State of Minnesota has failed to respond to Association inquiries regarding The Association's potential participation.

The Association is a non-profit organization which was organized in October 1919 to provide a voice for the consumer banking industry. Since that time, the membership of The Association has grown to over 300 commercial banks of all sizes which are actively engaged in extending consumer credit. Combined, the members of The Association extend over 50% of all consumer credit outstandings held by commercial banks. Their consumer credit outstandings total more than \$54,750,000,000.

Over one-half of The Association's members are national banks which engage in a substantial volume of interstate credit transactions on a continuing basis. The active, day-to-day operations of these banks, developed over many years, are based upon the authority contained in the National Bank Act as it has been interpreted and applied since 1874.

The Association is vitally interested in having this Court sustain the position advanced by the Respondent First Omaha Service Corporation ("Service Corporation"). The complex issues raised in this case have an impact well beyond the scope of operations of the Service Corporation and clearly beyond the geographical boundaries of Minnesota. The resolution of these complex issues will have a substantial impact on

the existing national banking system. These vital interests can be represented adequately only through an examination of those issues from the perspective of a large number of interstate lenders which are representative of the entire country.

The Association believes that the full scope of these issues should be presented to the Court. The ramifications of these issues extend far beyond the facts of this case and should be examined and discussed from diverse perspectives.

Of particular concern to The Association is the suggestion that 114 years after its adoption, the National Bank Act should be reinterpreted to create "equality" between state banks and national banks. Such a substantial departure from prior interpretation would have an impact on virtually all national banks which engage in interstate lending. Furthermore, certain arguments have been presented to this Court which are based upon incorrect or obsolete economic considerations.

A decision on the merits of this case will directly influence the banking practices of most of The Association's members. The adoption by this Court of the position to be presented by The Association would dispose of this case in a manner consistent with the historical context of the National Bank Act, the legislative history of the Act, prior judicial and administrative interpretations and the decisions of the three courts which have recently considered the specific issue presented.

Respectfully submitted,

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Date: August 1, 1978

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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No. 77-1258

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THE STATE OF MINNESOTA, by  
WARREN SPANNAUS, its Attorney General, *Petitioner*,

vs.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

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No. 77-1265

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THE MARQUETTE NATIONAL BANK  
OF MINNEAPOLIS, *Petitioner*,

vs.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

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On a Writ of Certiorari to the  
Supreme Court of Minnesota

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**BRIEF OF THE CONSUMER BANKERS  
ASSOCIATION AS AMICUS CURIAE**

The Consumer Bankers Association ("The Association") respectfully submits this Brief as *amicus curiae* in support of the Respondent.

### INTEREST OF AMICUS CURIAE

The Association consists of more than 300 commercial banks of all sizes, over one-half of which are national banks. These banks engage in a substantial volume of interstate credit transactions on a continuing basis. The active, day-to-day operations of these banks, developed over many years, are based upon the authority contained in the National Bank Act, adopted in 1864, as it has been consistently interpreted and applied since 1874.

Due to this extensive interstate lending activity, The Association is greatly interested in seeing that the position advanced by Respondent First Omaha Service Corporation ("Service Corporation") be sustained by this Court. The complex issues raised in this case have a substantial impact well beyond the scope of operations of the Service Corporation and clearly beyond the geographical boundaries of Minnesota. The resolution of those issues will have a substantial impact on the existing national banking system. These vital interests can be represented adequately only through an examination of those issues from the perspective of a large number of interstate lenders representing the entire country. The ramifications of this case extend far beyond its specific facts.

In this case, Petitioner Marquette National Bank sought to enjoin the First National Bank of Omaha (subsequently dismissed from the suit by Petitioner) and Respondent Service Corporation from offering a Nebraska-based credit card program to Minnesota residents. The First National Bank of Omaha is located in Nebraska, which permits interest on revolving credit accounts at 18% for the first \$999 of the unpaid balance

and 12% on any unpaid balance of \$1,000 or more. Petitioners argue that a Minnesota statute, which limits state banks to 12% plus authorizing an annual service charge of up to \$15, should apply to the Nebraska national bank card program. The decision below properly found that the program operated by Service Corporation could appropriately look to the Nebraska statute. This factual setting is a familiar one recognizable to many national banks which are interstate lenders. In considering the implications of this case as applied to these interstate lenders, The Association finds particularly troublesome the suggestion that 114 years after its adoption and 104 years after it was first interpreted by this Court, the National Bank Act should be reinterpreted to create interest rate "equality" between state banks and national banks. This substantial departure will have an impact on virtually all national banks which engage in interstate lending. Furthermore, certain arguments have been presented to this Court which are based upon incorrect or obsolete economic data. The Association, its members and the consumers they serve, all have a vital interest in placing accurate data before this Court.

The Association is interested in assuring the continued ability of national banks all over the country to look at and rely upon the National Bank Act as they carry out interstate banking activities. If national banks are unable to rely upon the plain language of that Act, as consistently interpreted by this Court, the stability and viability of our national banking system will be endangered.

### SUMMARY OF ARGUMENT

Assuming that the Court has jurisdiction to decide the merits of the case,<sup>1</sup> The Consumer Bankers Association submits that the legislative history of 12 U.S.C. § 85, the consistent decisions of this and other Courts in the 114 years since enactment of Section 85, and sound economic policy support the decision of the Supreme Court of Minnesota. A national bank located in Nebraska may charge interest on all its loans, including interstate loans to consumers in Minnesota, at the highest lending rate permitted by Nebraska law to any lender. The Nebraska bank is not limited by a lower interest rate established by Minn. Stat. § 48.185 for its state banks.

Petitioners suggest that the questions presented here must be analyzed against a background of "competitive equality" with respect to the interest rates which national and state banks are empowered to assess. In point of fact, however, Congress did not intend for competitive equality to exist between state and na-

<sup>1</sup> The Association is proceeding under the assumption that the Petitions for Writ of Certiorari were filed in a timely manner. The Court's footnote in *United States v. Adams*, 383 U.S. 39 (1966), suggests strongly that the jurisdictional requirement contained in 28 U.S.C. § 2101(e) has not been met by the Petitioners. "Where a timely motion [for rehearing] is filed, the time in such cases runs from the date of the order overruling the motion." 383 U.S. at 41 n.1 (Emphasis added). Accordingly, the Association respectfully submits that the Court lacks jurisdiction in this case.

The Association must also point out that the Respondent in this case is not an issuer of credit cards, does not extend credit and, of course, is not a national bank. Although the decision below seems to treat the First National Bank of Omaha as though that national bank were before it, that is not factually accurate. The Association questions the appropriateness of a decision being rendered in this case on a point of critical importance to national banks when a national bank is not even a party to the proceeding.

tional banks when it enacted federal banking statutes in 1863 and 1864 and attempted to tax state banks out of existence in 1865. Congress intended to favor national banks. Specifically, the Congressional debate on Section 30 of the National Bank Act of 1864, now Section 85, makes clear that the final version was designed to prevent states from passing interest rate legislation hostile to national banks and to permit national banks to make loans at an interest rate equal to the highest rate permitted to be charged by *any lender* in the state. National banks were not to be tied to the rate applicable to state banks which might be lower.

As recognized since this Court's *Tiffany* decision in 1874, Section 85 places national banks in the position of most favored lenders on the critical issue of maximum permissible interest rates. The policy of "equalization" between national and state banks upon which the Petitioners rely so heavily simply lacks merit in the area of interest rates; the cases cited by the Petitioners involve either instances in which this Court recognized "equality" for the purpose of giving national banks equal advantages with state banks or looked to that principle when either silence or the absence of conflicting language in the National Bank Act led this Court to conclude there was little Congressional interest in the area regulated.

The plain meaning of Section 85 is that a national bank can charge the highest interest rate allowed to any lender of the state where the bank is located, which may or may not be the same rate allowed state banks. Moreover, the national bank can charge that rate on all its loans, irrespective of geographical or political boundaries. The "except" clause of Section 85, as made clear by the Congressional debates and as



properly analyzed by this Court in *Tiffany* and more recently by the Seventh and Eighth Circuits in the *Fisher* cases, is an enabling clause, not a restrictive one. If a higher interest rate is applicable to state banks, then national banks are "allowed" to take advantage of that higher rate. On the other hand, to the extent that Minnesota law sets a lower rate for state banks which, if imposed on national banks, would conflict with the right conferred by the paramount federal statute, the Minnesota statute is preempted.

Sound economic reasons exist for providing national banks the type of interest flexibility contemplated by Congress and enunciated by the courts since the enactment of Section 85. Low state interest rate ceilings do *not* protect the consumer; in fact, more often than not, they cause the true cost of credit to be hidden or an unreasonable reduction in the supply of credit available to credit-worthy consumers. Furthermore, existing data indicate that there is vigorous competition among lenders, as well as widespread awareness by consumers of the cost of borrowing money. If unrestrained by price controls, a competitive credit market will produce social results fair to consumers, fair to lenders and beneficial to the economy as a whole. The decision of the Supreme Court of Minnesota fosters that competition in the interstate credit market. To reverse the decision of the Supreme Court of Minnesota and 104 years of precedent, however, would have an adverse impact upon the current expansion of interstate lending.

The Minnesota statute (§ 48.185), which the Petitioners seek to have apply to interstate loans made to Minnesota consumers, limits the rate of interest that Minnesota state banks and savings banks can charge on open-end revolving credit card transactions. Yet,

higher rates are allowed by Minnesota to small loan companies making loans to Minnesota consumers (§ 56.13). Under the most favored lender doctrine, a national bank may take advantage of the highest lending rate in the state and is not restricted to a lower rate provided for state banks. National banks, whether located in Minnesota, Nebraska or any other state, are not subject to restrictions placed by Minnesota on its state banks in light of favoritism extended to other Minnesota lenders. That is precisely the objective sought by Congress in enacting Section 85.

The interpretation and policy of Section 85 have been clearly established for over 104 years, and should not be reinterpreted without the deliberate investigation and fact-finding which are available only through the legislative process. Such a substantial departure would have an incalculable impact on all national banks which engage in interstate lending.

## ARGUMENT

**I. NEITHER THE HISTORICAL CONTEXT NOR THE DIRECT LEGISLATIVE HISTORY SUPPORTS THE "COMPETITIVE EQUALITY" ARGUMENT SUGGESTED BY PETITIONERS. NEITHER THE COURTS NOR THE ADMINISTERING AGENCY HAVE CREATED SUCH PARITY IN DETERMINING MAXIMUM PERMISSIBLE INTEREST RATES FOR NATIONAL BANKS.**

In the briefs presented to the Court, much attention is focused on an alleged "policy of competitive equality" between state and national banks under Section 85 of the National Bank Act.<sup>2</sup> In seeking a review of

<sup>2</sup> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . . and

the decision below, Petitioners, in a tangential way, and Amicus Conference of State Bank Supervisors, in a direct way, argue that this is the underlying rationale of the National Bank Act, and that the Court should review the decision below in that context. By making that argument, they challenge the very underpinnings of the national banking system. Before considering the specific issue presented in this case, that is, the ability of a Nebraska national bank to charge interest in accordance with the Nebraska statute on all of its loans, it is essential that this suggestion be dispelled.

This suggestion is simply incompatible with the political climate which existed in the early 1860s and the floor debates which accompanied passage of this section. Applying the plain language and recognizing the historical and legislative setting, this Court has acknowledged that Section 85 establishes a limited advantage for national banks. Furthermore, the discussions by reviewing courts have turned to competitive factors *only* when to do so favors national banks or when not guided by a specific provision of the Act. In the instant case, however, the Act is not silent on the critically important issue of permissible interest rates, since Section 85 is a specific provision describing the rights of national banks with respect to charging interest.

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no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. . . ." 12 U.S.C. § 85, as derived from Act of June 3, 1864, ch. 106, § 30, 13 Stat. 108, as amended by Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191; Act of Aug. 23, 1935, ch. 614, § 314, 49 Stat. 711; Act of Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558.

**A. The Political Environment Which Existed During The Early 1860s Was Marked By Clear Support For National Bank Development And Antipathy For State Banks, Belying Any Contemporary Suggestion That Congress Intended A "Policy of Equalization".**

Congress did not intend for competitive equality to exist between state and national banks when it enacted federal banking statutes in 1863 and 1864. The exigencies of the Civil War required the federal government to gain control over the monetary system and establish a uniform currency. *See* B. Hammond, *Banks and Politics in America from the Revolution to the Civil War* 723 (1957); Million, *The Debate on the National Bank Act of 1863*, 2 J. Pol. Econ. 251, 270 (1894) [hereinafter cited as Million, *The Debate*]. Congress intended to create a new system of national banks as an agency for the collection of taxes, as depositories for public funds, as a medium for funding a large part of the national debt and to allow the resumption of specie payments. Million, *The Debate* at 270. *See* A. Lincoln, Special Message On Financing The War, *Senate Journal* 121-22, 37th Cong., 3rd Sess. (Jan. 17, 1863).

The purpose of the 1863 Act was not to erect a dual system of competing state and national banks, but rather to supersede the existing system of state banks with national banks. Secretary of the Treasury (later Chief Justice) Salmon P. Chase submitted recommendations on the establishment of a system of national banks to the House Ways and Means Committee, which recommendations formed the core of the 1863 Act. J. Sherman, *Recollections* 271 (1895). Secretary Chase intended that state institutions should be transformed into national institutions. Million, *The*



*Debate* at 266. Senator John Sherman of Ohio, the Lincoln administration's banking spokesman in the Senate, was convinced that the whole system of state banks was both unconstitutional and inexpedient. J. Sherman, *Recollections* 284 (1895). Senator Sherman's bill contained a clause taxing state banks one percent on their issued notes. Million, *The Debate* at 268 n.1. "Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks." *Id.* at 267. An amendment to the 1863 Act was adopted for the express purpose of easing the conversion of state banks into national banks. *Cong. Globe*, 37th Cong., 3rd Sess. 850 (1863). Following the passage of the 1863 Act, it was widely expected that existing banks would surrender their state charters and reincorporate with national charters under the terms of the new law. B. Hammond, *Banks and Politics, supra*, at 728.

The 1864 revision of the banking act was designed to speed the conversion of state banks to national banks. P. Studenski and H. Krooss, *Financial History of the United States* 154 (2d ed. 1963). Representative Hooper of Massachusetts reported the bill to the House from the Ways and Means Committee.

In discussing the bill at a later date Mr. Hooper said that the *only* purpose of it was "to amend the Act which established that system, to correct what the observation and experience of the past year had shown to be imperfect, and to render the law so perfect that the state banks might be induced to organize under it in preference to continuing under their state charters."

Million, *The Debate* at 279 (Citing *Cong. Globe*, 38th Cong., 1st Sess. 1256 (1864)) (Emphasis added).

When it became clear that state banks were not responding to the more subtle pressures to convert to national charters which were contained in the 1863 and 1864 statutes, state bank notes were subjected to a prohibitive tax in 1865. B. Hammond, *Banks and Politics, supra*, at 732, 733. Speaking for a 10 percent tax on state notes which he introduced, Senator Sherman stated, "The national banks were intended to supersede the state banks. Both cannot exist together." *Id.* at 733; *Cong. Globe*, 38th Cong., 2nd Sess. 1139 (1865). Sherman's bill, levying a prohibitive tax on state banks, passed March 3, 1865.

It was in this legislative atmosphere that Congress, in 1864, adopted what is now 12 U.S.C. § 85, which Petitioners ask this Court to read as mandating equality of treatment in the charging of interest as between state and national banks. In light of the 1863 and 1864 statutes and the 1865 tax on state banks, it is beyond reasonable doubt that the intent of Congressional efforts in this area was not to preserve and perpetuate state banks but, rather, to eliminate them. This context makes ludicrous any suggestion of a careful, deliberative, clearly enunciated effort to provide state-national bank equality of interest rates.

**B. The Congressional Debates Which Accompanied The Passage Of Section 85 Reflect That Congress Intended Not To Create "Competitive Equality" Between State And National Banks, But Rather To Favor National Banks.**

When Section 30 of the 1864 Act, now Section 85, was presented to the Senate, two factions debated the all important question of the permissible interest rates on loans to be made by national banks. One side sought to prevent national banks from charging higher interest rates than state banks. The other faction sought to



prevent states from passing interest rate legislation hostile to national banks by allowing other lenders in the state to charge more. *First National Bank in Mena v. Nowlin*, 509 F.2d 872, 879-80 (8th Cir. 1975).

Congressional debate centered on whether national banks would be empowered to charge the rate of interest "allowed" by state law to any state lender or would be restricted to the rate of interest "established" for state banks. Congressional opponents of the "allowed" language recognized that it would permit national banks to charge interest rates which any lender could charge, including rates in excess of those permitted to state banks. *Cong. Globe*, 38th Cong., 1st Sess. 2124, 2125 (1864) (remarks of Sen. Grimes). Proponents of the "allowed" language argued that the plight of the state banks could be remedied by state legislation allowing state banks the highest rate of interest permitted to any lending institution. *Id.* at 2126 (remarks of Sen. Sherman).

The battle lines were clearly drawn between senators favoring the expansive term "allowed" and senators favoring the restrictive term "established." The amendment to Section 85 agreed to and submitted by the Senate Committee on Finance contained the term "allowed." *Id.* at 2123. Senator Grimes of Iowa, however, suggested an amendment which inserted "established" for "allowed." Believing that the terms were synonymous, Senator Sherman originally agreed to the amendment and, in fact, moved its adoption. *Id.* at 2125. The ensuing debate, however, quickly demonstrated that many senators did not consider the terms to be synonymous.

Before the "allowed" versus "established" question was resolved, Senator Henderson of Missouri proposed an amendment designed to put national banks "on precisely the same footing" as state banks. *Id.* at 2126 (remarks of Senators Henderson and Doolittle). A roll call vote was begun on the Henderson amendment, but before the result was announced, Senator Henderson withdrew his amendment. Analyzing this series of events, the Sixth Circuit correctly concluded that the amendment, designed to put national banks "on precisely the same footing with state banks so far as this matter of taking interest is concerned" (remarks of Senator Doolittle), was "expressly rejected by the Senate." *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972).

Having disposed of the Henderson amendment, the question recurred as to the implications of having earlier substituted "established" for the term "allowed." In concluding that this change, effected by his own motion, should be reconsidered and the original language restored, Senator Sherman reiterated his commitment to the proposition that national banks must be allowed to charge rates granted to competing state lending institutions or individuals:

I know that the amendment [using the term "allowed"] as agreed upon in the Committee on Finance was well and carefully considered, and was intended to confer on these national banks the same privileges that are conferred by the laws of the States on other *associations and individuals*, and therefore, to avoid the controversy, I will move to reconsider the vote on the amendment proposed by the Senator from Iowa which was adopted, and let us have the original amend-

ment stand just as it was reported from the committee, which I know was considered carefully, and which *will allow those national banks the same rate of interest as is provided for by the local law for the people within their own States.* If the States choose to change their law, they can change it at any time. My own preference, however, as I have already stated, is to establish a uniform rate of interest by our law; but having been overruled on that point, *I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its laws.*

*Cong. Globe*, 38th Cong., 1st Sess. 2126 (1864) (Emphasis added).

Following further debate, Senator Conness moved to reconsider the vote upon which "established" was substituted for "allowed." *Id.* at 2127. "The motion to reconsider was agreed to." *Id.* Accordingly, the original committee language using the term "allowed" was restored and further consideration of the amendment was "passed over." *Id.* at 2127-28.<sup>5</sup>

This debate and its eventual outcome provide critically important insight into the Congressional response to the suggestion, urged in 1864 by Senators Grimes

<sup>5</sup> A subsequent reference made when later in the consideration of the Act, Senator Sherman was adding an "except" clause to this sentence of Section 85 erroneously refers to "established." *Cong. Globe*, 38th Cong., 1st Sess. 2145 (1864). Given the procedural activity detailed here and the final version of the Act, and contrary to the suggestion contained in the Brief tendered by the Conference of State Bank Supervisors at 31, it is clear that this resulted from a misprint or typographical error. See Comment, *National And State Bank Interest Rates Under The National Bank Act: Preference Or Parity?* 58 Iowa L. Rev. 1250, 1256 n.46 (1973).

and Henderson and now by the Petitioners before this Court, that state and national banks should be on an equal basis with respect to maximum interest rates.

Having established the general rule, Senator Sherman further amended Section 85 by inserting, after the first clause which permitted the highest rate in the state where the bank is located, "except that where by the laws of any state a different rate is limited for banks organized under state law, the rate so limited shall be allowed for organizations organized or existing in any such state under this chapter." *Id.* at 2145. Although no specific legislative history accompanies this amendment, the preceding debate which centered on the word "allowed" places beyond reasonable dispute that as used in this amendment "allowed" was intended as a permissive, broadening term and not a restrictive one. In common usage, "allow" means to permit, to let have. *Webster's Third New International Dictionary*, Unabridged (3rd ed. 1976). To interpret this clause as a restriction would be to reject overtly the meaning of this term which was expressly recognized by Congress as being expansive and is commonly used to permit activity which would not otherwise be permissible.

Furthermore, it must be emphasized that the amendment adding the "except" clause was offered by Senator Sherman. It was, of course, Senator Sherman who, as quoted above, felt that the viability of the fledgling national banking system depended upon the authority of national banks to assess interest at the highest rate permitted to be charged by *any* lender.

The debates on Section 85 provide clear evidence as to the relationship between the interest rate to be per-

mitted by Congress to national banks and those allowed by the states to state banks. The prevailing view, indicated by the reference to the "rate *allowed* by the laws of the state," as reinserted by the Senate, demonstrates that national banks were never intended to be limited to a state's general usury rate, but, rather, could look to any rates established or allowed for special transactions or special classes of lenders. Thus, if any lender is exempted from the general usury statute and allowed to charge higher rates, national banks could also charge the higher rate, irrespective of the treatment afforded by the state to state banks.

**C. This Court And Other Courts Have Recognized Consistently That Congress Granted National Banks A Preferred Status With Respect To Maximum Permissible Interest Rates.**

This historical background and the direct legislative history of Section 85 of the National Bank Act have been the subject of extensive judicial examination and analysis. In interpreting this provision, this Court and many other courts have consistently held that Section 85 authorizes national banks to make loans at an interest rate equal to the highest rate which could be charged by any other lender in the state.

The Petitioners' contention that Section 85 contemplates "competitive equality" was first argued and rejected in a case decided by this Court on January 19, 1874. *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), held that Section 85 of Title 12 places national banks in a position of limited advantage over state banks by allowing them to charge interest at the highest rate applicable under state law to lenders generally in each respective state, not necessarily at the rate applicable to state banks which may have a lower

rate. In reaching this conclusion, this Court repeatedly recognized the "spirit" of the National Bank Act, obviously looking to the historical and legislative context in which this section was forged. Noting that the words "and no more" acted to limit only the general rate of interest, this Court determined that the "except" clause formed an exception from the "no more" restriction.

But if it was intended [that national banks] should in no case charge a higher rate of interest than state banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more" as they were added to the preceding clause of the section. The absence of those words, or words equivalent, is significant. Coupled with the general spirit of the Act, and of all the legislation respecting national banks it is controlling.

85 U.S. (18 Wall.) at 412.

As properly analyzed in *Tiffany*, Section 85 provides "at least equal advantages" to national banks and, in fact, makes them favored lenders. *Id.* It should be noted that "most favored lender" is merely another way of stating that states cannot discriminate against national banks. Simply stated, this phrase means that whatever states allow to any lender, they must allow to national banks. That line of reasoning and analysis has been followed by this and other Courts and relied upon by national banks for the past 104 years. *See, Farmers' & Merchants' National Bank v. Dearing*, 91 U.S. 29 (1875); *Hazeltine v. Central National Bank*, 183 U.S. 132 (1901); *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919); *Barnet v. Muncie National Bank*, 98



U.S. 555 (1879); *Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900); *Schuyler National Bank v. Gadsden*, 191 U.S. 451 (1903). This interpretation remains equally valid today and serves as the basis for much of the interstate lending which has characterized the development of a stable national banking system.

In its tendered Brief, Amicus Conference of State Bank Supervisors urges the Court to overrule *Tiffany* and to place state and national banks on an exactly equal basis with respect to allowable interest rates. It is essential to point out the result which would obtain if this argument were adopted. By tying permissible interest rates exclusively to those allowed to state banks, national banks become completely vulnerable to state legislatures which may choose to discriminate against state banks. This position leaves state banks and, thus, by the Supervisors' reasoning, national banks, susceptible to the shifting attitudes which state legislatures may have from time to time toward their state banks. The stature and status of state banks would directly control national banks. Should state banks, because of specific activities on their part or because more desirable lending entities become available, fall out of favor with state legislatures, national banks would fall with them.

For instance, if a state determined that lending to its citizens could better be carried out by a cooperative entity or even a public lending utility, legislation could be passed to limit state banks to an unrealistically low interest rate. Following the Supervisors' argument, national banks, strictly limited to the rates allowed to state banks, would similarly be placed into jeopardy, thus imperilling the national banking system. The drafters of Section 85 and the early inter-

pretation of this Court recognized that reliance upon continued fair and equitable treatment by state legislation of state banks was an insufficient safeguard to protect national banks. The only future certainty was that in every state some individual or entity would be allowed to charge interest at a reasonable rate. It was for that reason that national banks were permitted to charge the highest interest rate allowed to any lender.

The Petitioners' Briefs and the Amicus Brief tendered by the Conference of State Bank Supervisors urge that the pronouncements of this Court in unrelated areas somehow compel a rereading of Section 85. These contentions are unfounded.

Principal reliance is placed on *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). In *Walker Bank*, this Court interpreted *not* the National Bank Act as passed in 1864 but amendments to that Act adopted in 1927 and 1933. 385 U.S. at 257. After discussing the legislative history developed in 1927 and 1933, this Court arrived at a discussion of "competitive equality."

In its tendered brief, the Conference of State Bank Supervisors quotes from *Walker Bank* to the effect that Congress was embracing a "policy of equalization" of the 1864 Act. That brief failed, however, to point out that this Court began its discussion in the first sentence of the paragraph in which the sentence there quoted appears by clearly limiting the suggested "competitive equality" to the branch banking issue under consideration. "It appears clear from this resumé of the [1927 and 1933] legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive

equality' insofar as branch banking was concerned." 385 U.S. at 261. (Emphasis added).

The other cases cited by Petitioner State of Minnesota and considered by this Court in reaching its decision in *Walker Bank* similarly do not lead to the conclusion that the long-standing meaning of Section 85 has changed. Those cases involve either instances in which this Court recognized "equality" for the purpose of giving national banks advantages in order to make them equal with state banks or looked to that general principle when silence or the absence of conflicting language in the National Bank Act led this Court to conclude that there was little Congressional interest in the area being regulated.

In *Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S. 559 (1934), cited by Petitioner State of Minnesota and relied upon in *Walker Bank*, this Court examined whether a state could require a national bank which served as a depository of state funds to post a surety bond. This Court acknowledged that Congress, in 1930, had adopted an amendment to the National Bank Act, specifically authorizing national banks to provide a bond "of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." Act of June 25, 1930, ch. 604, 46 Stat. 809. Even recognizing this Congressionally mandated ability of national banks to provide these bonds, this Court noted that this state law could not apply if the state law "interferes with the purposes of its creation, or destroys its efficiency or is in conflict with some paramount federal law." 292 U.S. at 566. Clearly, the imposition of the critical issue of interest rates is one which goes to the

very heart of the purpose and efficiency of a national bank.

Furthermore, in *Lewis*, the discussion of equality of competition between state and national banks involved allowing national banks a power under the National Bank Act which enabled them to compete against state banks. "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits." 292 U.S. at 565. Clearly, this Court, in *Lewis*, did not, in any way, erode the view set forth with respect to interest rates in *Tiffany*.

Other cases relied upon by Petitioners relate to areas in which the National Bank Act is simply silent or does not contain language which conflicts with state law. Recognizing the all-important nature of interest rates, however, Congress specifically provided for their treatment as discussed above. Other issues, clearly less compelling and certainly less closely related to the success or failure of the national banking system, were not specifically addressed in the Act. On these issues, this Court has, from time to time, in the absence of statutory language, looked to the provisions employed by the states in determining the rules which are to apply to national banks located in those states.

This situation was presented in *Anderson National Bank v. Lockett*, 321 U.S. 233 (1944), where this Court held that a Kentucky escheat statute applied with equal force to national banks. The Court specifically looked to determine whether applicable language appeared in the national banking statute. Finding no conflicting language or policy in the national bank statute

which prevented the application of the Kentucky law, the Court held that for purposes of escheat law, national banks located in Kentucky had to follow that law. 321 U.S. at 247-48. To the same effect, see *Waite v. Dowley*, 94 U.S. 527 (1876); *McClellan v. Chipman*, 164 U.S. 347 (1896).

*Tiffany*, decided in January 1874, contained a cogent analysis of the language contained in Section 85 viewed by a court interpreting a recently enacted statute. That examination of the "words and spirit" of the legislation is no less valid and applicable today than it was 104 years ago. Recent pronouncements of this Court, authorizing national banks to enjoy the same benefits as state banks or reviewing the responsibilities of national banks in the absence of federal statutory coverage, in no way diminish the rationale or correctness of *Tiffany*.

**D. Administrative Interpretation Of Section 85 Allows National Banks To Charge Interest Rates Commensurate With The State's Most Favored Lender.**

The "most favored lender" rule, as established by Section 85 and enunciated by this Court, has been incorporated in the regulations of the Comptroller of the Currency, the office specifically charged with administering the Act and regulating national banks. 12 U.S.C. §§ 1, *et seq.*

(a) A national bank may charge interest at the maximum rate permitted by State law to any competing State chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans; a national bank making such loans at such higher rate is subject to the provisions of State law relating to such class loans that are material to the determination of the in-

terest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed.

12 C.F.R. § 7.7310 (1977).

As applied to the instant case, this ruling provides that national banks can avail themselves of the interest rate ceiling of the Minnesota small loan statute, even if they do not comply with any of the provisions of that statute other than those relating to the interest rate.

This Court has always given great deference to interpretative regulations issued by the official or agency charged with the administration of a statute. *Udall v. Tallman*, 380 U.S. 1 (1965). To sustain the agency's application of a statutory term, the Court "need not find that its construction is the only reasonable one or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946). See also *Gray v. Powell*, 314 U.S. 402 (1941); *Universal Battery Co. v. United States*, 281 U.S. 580, 583 (1930).

**II. SECTION 85 EMPOWERS A NEBRASKA NATIONAL BANK TO CHARGE THE HIGHEST INTEREST RATE ALLOWED BY THE STATE OF NEBRASKA. THE STATE IN WHICH IT IS LOCATED FOR ALL OF ITS LOANS. TO THE EXTENT THAT MINNESOTA LAW IS INCONSISTENT, IT IS PREEMPTED.**

**A. Section 85 Clearly Entitles A National Bank To Charge The Highest Interest Rate Allowed In The State In Which It Is Located For All Of Its Loans.**

The plain meaning of Section 85 is that a national bank can charge the highest interest rate allowed to any creditor of the state *where that national bank*



is located, which may or may not be the same rate allowed state banks. In any event, however, the rate will be at least as much as state banks are allowed.

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

#### 12 U.S.C. § 85.

This controlling first sentence of Section 85 can best be analyzed by focusing on two key phrases, the basic grant of authority and the subsequent "except" clause.

The first clause is a general grant of authority to "charge on *any* loan . . . interest at the rate allowed by the laws of the State . . . *where the bank is located.*" 12 U.S.C. § 85 (emphasis added). This provision is universally applicable to national banks, and it is the only mechanism established by Congress enabling national banks to charge interest. This section authorizes a national bank to charge the *highest* rate of its home state in connection with *all* of the loans that it makes. Both Petitioners have acknowledged that the First National Bank of Omaha, represented by the Respondent, "is located" in Nebraska. Petitioner Marquette National Bank Brief at 16. Petitioner State of Minnesota Brief at 3. Petitioners clearly recognize that "located" in Section 85 refers to the home or charter state of the national bank.

A contrary result is not required by this Court's decision in *Citizens and Southern National Bank v. Bougas*,

434 U.S. 35 (1977). In that case, the Court analyzed the venue provisions which applied to national banks pursuant to 12 U.S.C. § 94. The Court held that for purposes of venue in state courts, the federal statute allowed county lines to be ignored when the national bank had "established a permanent business" in a county other than the one reflected in its charter. 434 U.S. at 44 n.10. The Court reached this conclusion after deciding that the physical location of an authorized branch bank in another county would not disrupt a national bank's business or inconvenience it in terms of providing bank records. The *Citizens and Southern* case merely recognizes that when the records which are subject to civil litigation are held by a branch bank in a county other than the national bank's charter county, it is altogether appropriate and possibly more convenient to all parties to allow venue in the branch bank county.

Here, the situation differs both factually and legally. The First National Bank of Omaha has not established a branch or any permanent business location in Minnesota. The legal considerations underlying the application of Section 85 are quite different from those involved in Section 94 and addressed by the Court in *Citizens and Southern*. For example, ignoring county lines for venue purposes does not in any way alter the substantive rights of a national bank. Disregarding state boundaries, however, as sought in the instant case, would be determinative of rights governed by federal law. In short, *Citizens and Southern* neither requires nor would support a decision under Section 85 that First National Bank of Omaha is located in Minnesota as well as Nebraska.

Since First National Bank of Omaha "is located" in Nebraska, it may look to and rely upon the highest rate

of interest permitted there in determining the interest rates which it may charge with respect to *any* of the loans which it makes. The statute neither provides nor suggests a limitation on the use of the term "any," thus making that rule applicable to loans made by the bank irrespective of geographical or political boundaries.

The second or the "except" clause has been discussed earlier in this Brief. See this Brief at 13-14. As proposed by Senator Sherman and as properly analyzed in *Tiffany*, this clause provides not a limitation on the general grant of power, but rather, is an "enabling" provision. *Tiffany* at 411.

The meaning of the plain language in Section 85 has been recognized by the U.S. Courts of Appeals for both the Seventh and Eighth Circuits. *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977). These decisions, together with the decision below, provide uniform judicial agreement as to the application of Section 85.

Both Petitioners commend to the attention of this Court *Meadow Brook National Bank v. Recile*, 302 F.Supp. 62 (E.D. La. 1969). That case, which chose to ignore the applicability of federal law to interstate loans by national banks and this Court's holdings in *Tiffany* and subsequent cases, was clearly decided incorrectly. In addition, The Association is constrained to emphasize, as pointed out by the Respondent, that a new trial was ordered in that case following the issuance of the opinion which Petitioners urge this Court to adopt. See Brief for Respondent in Opposition to the Petition for Writ of Certiorari, Appendix at 7. It is beyond question that the granting of a new trial has the

impact of vacating the decision earlier rendered. *Allegheny County v. Maryland Casualty Co.*, 132 F.2d 894 (3rd Cir.), *cert. denied*, 318 U.S. 787 (1943). A vacated case, of course, is treated as though it had never existed. *Board of Supervisors v. Tureaud*, 226 F.2d 714 (5th Cir. 1955); *Stewart v. Oneal*, 237 F. 897, 903 (6th Cir. 1917). This makes wholly inappropriate the Petitioners' suggestion, without explanation, that this vacated case should in any way influence the Court.

**B. Because National Banks Are Subject To The Paramount Authority Of The United States, Section 85 Preempts States From Exercising Direct Control Over Interest Rates Charged By National Banks.**

Contrary to the conclusory suggestion of the Conference of State Bank Supervisors, Congress was not faced with the cataclysmic choice of (1) ignoring the states and state law or (2) granting national banks the "same authority as state banks." Tendered Amicus Brief at 7. The third alternative, and, in fact, the one adopted, was to look to state law in order to incorporate the highest rate of interest permitted to be charged by any individual or entity. In adopting this alternative, Congress expressly recognized the general authority of the states to establish interest rates, but, as discussed above, rejected the notion that interest rate levels as between state and national banks had to be identical.

Thus, the role that the federal law ascribes to the state in which the national bank is located is to provide the highest permissible interest rate. Once the state law supplies that rate, it becomes part of the federal law and is entitled to traditional concepts of federal supremacy over state law.

As applied here, the federal law incorporates the Nebraska rate of interest. The Minnesota rate is not preempted by Nebraska law; it simply is never incorporated into the federal law. For the purposes of Section 85, as with other federal statutes, once the federal provision is made complete by incorporating the Nebraska rate, the federal law provision clearly preempts any other state law. An attempt to apply the Minnesota rate against federal law, which has incorporated the Nebraska rate, must fail in recognition of the Supremacy Clause. U.S. Const. art. 6, cl. 2.

The power of national banks to charge interest under Section 85 is exclusive of state law because national banks are subject to the paramount authority of the United States, and states cannot interfere with the operations of national banks, except as specifically allowed by Congress. *Farmers' & Merchants' National Bank v. Dearing*, 91 U.S. 29 (1875). The provisions of Section 85 fixing the rate of interest which can be taken by national banks are controlling over any state interest laws. *Schuyler National Bank v. Gadsden*, 191 U.S. 451 (1903); *Barnet v. Muncie National Bank*, 98 U.S. 555, 558 (1879).

In *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896), the Court held:

National banks are instrumentalities of the federal government, created for public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the

national legislation or impairs the efficiency of these agencies of the federal government of which they were created.

161 U.S. at 283.

When Congress passed Section 85, it preempted the states from directly legislating such rates. The interest which a national bank charges is not governed by state law, but is governed by federal statute. To the extent that Minnesota law conflicts with the right conferred by the paramount federal statute, it is preempted. This inescapable conclusion was recognized in *Farmers' & Merchants' National Bank v. Dearing*, where this Court held that preemption of state law by Section 85 was based upon the Supremacy Clause, and prohibited state actions which conflicted with the federal statute authorizing national banks to charge interest:

It must always be borne in mind that the Constitution of the United States, "and the laws which shall be made in pursuance thereof," are "the supreme law of the land" (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws.

In any view that can be taken of the 30th section [§ 85], the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.

91 U.S. at 35.



**III. THE ECONOMIC ARGUMENTS MADE BY THE PETITIONERS AND THE TENDERED AMICUS CURIAE BRIEFS DO NOT SUPPORT A REVERSAL OF THE MINNESOTA SUPREME COURT; TO THE CONTRARY, COMPETITION AND AN EFFECTIVE CREDIT MARKET WOULD BE IMPAIRED BY A REVERSAL.**

**A. Introduction To The Economic Implications Of The Case.**

As shown in the preceding parts of this Brief, the legislative history of Section 85, as well as the consistent decisions of this and other Courts in the 114 years since enactment of Section 85, point squarely to the conclusion that a Nebraska national bank may charge interest on its bank credit card loans to Minnesota residents at the highest lending rate permitted by Nebraska, even if the rate applicable to Minnesota state banks is lower. That is and has been the settled rule.

Nevertheless, the Petitioners make several economic arguments that suggest there is something wrong with the rule. The Association believes those arguments are simply not consistent with economic reality as it exists in 1978, and this is a major reason that The Association has moved to obtain leave of Court to file this Brief. The Association wants to point out certain adverse economic and social implications which would result from a reversal of the Minnesota Supreme Court and to challenge the underlying premise of the Petitioners. That premise is that the State of Minnesota and its banks and consumers are being taken advantage of by an out-of-state national bank that may charge a higher interest rate than a Minnesota state or national bank can or does charge. By challenging that premise, The Association is not asking this Court to make value judgments in a complex commer-

cial area. These judgments are best left to Congress. The Association believes strongly, however, that there are sound policy reasons to support the present state of the law as enunciated most recently by the Seventh and Eighth Circuits and the Supreme Court of Minnesota. The arguments made by the Petitioners at the very least cry out for additional empirical study and legislative discussion. Indeed, The Association feels they are just plain wrong in light of consumer credit developments in the past 15 years.

As discussed more fully in the remainder of this part of the Brief, low state interest rate ceilings do *not* protect the consumer; in fact, more often than not, they cause the true cost of credit to be hidden or an unreasonable reduction in the supply of credit to credit-worthy consumers. Moreover, existing data indicate that there is vigorous competition among lenders, as well as increasing awareness by consumers of the cost of borrowing money. In short, there is now a competitive credit market that, unrestrained by price controls, will produce social results fair to consumers, fair to lenders, and beneficial to the economy as a whole. The desirability of allowing competitive factors to operate in Minnesota was acknowledged by Chief Justice Sheran in his concurring opinion in the decision below. *See* Petitioner Marquette National Bank's Petition for Writ of Certiorari at A-45. The decision of the Supreme Court of Minnesota fosters competition in the credit market and should be affirmed.

**B. State Usury Laws May Have An Adverse Impact Upon Consumers.**

At the highest theoretical level, much of the analysis by those advocating the position of the Petitioners proceeds upon the assumption that state legislative limitations upon interest rates—usury laws—are cornerstones of economic and social policy, and that the lower the legislature has set the rates, the better for the consumer. While that may have been true in Colonial days when the United States inherited usury rate ceilings from the British, it is not the case today. Indeed, there has been an active debate in the literature within the last ten years about the entire theoretical framework of usury laws and the social purposes which they are supposed to serve. See e.g., The Report of The National Commission on Consumer Finance, *Consumer Credit in the United States*, Chs. 6-7 (1972) [hereinafter cited as “NCCF Report”]; The National Commission on Consumer Finance, *Technical Studies*, Vol. IV, Ch. 10; Johnson, *Regulation of Finance Charges on Consumer Instalment Credit*, 66 Mich. L. Rev. 81 (1967) [hereinafter cited as Johnson, *Regulation of Charges*]; and Merriman & Hanks, *Revising State Usury Statutes In Light Of A Tight Money Market*, 27 Md. L. Rev. 1 (1967).

The National Commission on Consumer Finance concluded in its Report that:

On the basis of a summary of the historical approach to the establishment of rate ceilings and institutional knowledge about them the Commission must conclude that, on balance, rate ceilings are undesirable when markets are reasonably competitive. Imposition of rate ceilings on consumer credit transactions neither assures that most consumers will pay a fair price for the use of credit

nor prevents overburdening them with excessive debt. The public utility approach to rate making in the field of consumer credit is neither theoretically sound nor feasible although it can serve as a reminder that legislators must recognize the relationship between costs and credit sizes [*sic*] if they do set rate ceilings.

*NCCF Report* at 108.

It is essential in considering the question of interest to keep in mind that the use of money is like the use of any other good. Money, as a commodity, is no different from hard goods, groceries or other items which can be bought or loaned. Loans are nothing more than the leasing of a commodity (money) at a price (interest) agreed to by the parties. The pervasive system of state rate limitations is really a system of price controls on the amount to be paid for a specific commodity. As with most areas which are subject to price controls, these controls create aberrations in the marketplace and result in dislocations which may impose costs far in excess of any social benefit. If price controls on the cost of money are too low, one of two things may happen: (1) ways will be found by those involved in the transactions to avoid the controls or (2) the availability of loans will decrease and the supply of credit will dry up.

**1. The Rate Ceilings Set By Usury Laws Can Be Avoided.**

The first possibility is that price controls will simply be avoided. In any credit program, the lender looks for a total amount of revenue received to justify economically the investment made in a specific extension of credit. That revenue may be obtained through

one of several sources: interest, service charges, reduction in services provided in connection with credit extensions, different methods of calculation of permissible interest rates<sup>4</sup> and shifting direct costs to persons other than those directly involved in credit transactions. In all of these instances, the lender, by varying some aspect of the transaction or his course of business, is able to sustain the same amount of revenue flow.

Specifically, in conjunction with a credit card, each of the following techniques can be used to change that flow:

1. Increase the interest rate of credit to the consumer;
2. Increase the amount of service charge to the consumer;
3. Use a compounding technique, by adding accrued but unpaid finance charges to the amount upon which additional finance charges are collected;
4. Require that charges be paid "up front" thereby giving the lender the use of the funds;
5. Change the method of determining the amount upon which the finance charge is calculated—for instance, a shift from the adjusted balance method to the average daily balance method or the previous balance method;
6. Impose finance charges as of the date of transaction rather than providing an initial interest-free period;

<sup>4</sup> For an empirical study and discussion of the impact of different methods used by merchants and banks to assess charges on revolving credit, see Credit Research Center, Purdue University, Working Paper No. 21, *Bank and Retail Credit Card Yields Under Alternative Assessment Methods* (1978).

7. Increase the discount which must be paid by the merchant to the creditor on credit transactions.

Thus, when a lender determines that its rate of interest is at the maximum established by state law, the lender to the extent not prohibited by law simply alters one or more of these factors to sustain an acceptable level of earnings.

Perhaps the best example of the disruptions which result from this kind of shifting of revenues can be seen by examining the impact of a change in the discount charged by a lender to a merchant. In this instance, the credit card company agrees to accept credit transactions generated by a merchant but charges the merchant a certain percentage (or discount) for handling those accounts. If the lender is unable to charge the ultimate consumer a sufficient rate of interest, it has been demonstrated that the lender would maintain the stream of revenues by increasing the discount percentage which must be paid by the merchant.<sup>5</sup> In turn, if the merchant is to maintain his earnings, the increase in discount will be reflected in the price of goods sold to both cash and credit customers. Accordingly, cash customers are, in effect, required to absorb a portion of the credit costs attributable to credit customers. The result is subsidization of the credit purchases of middle and upper income con-

<sup>5</sup> Credit Research Center, Purdue University, *Study of Bank Credit Card Profitability For Banks Operating In The States of California and Washington* 13 (1977). The study done by Credit Research Center of the California and Washington credit card markets is extensive and the various papers of Credit Research Center discussing the study are cited frequently hereafter.



sumers by lower income persons who traditionally are unable to obtain credit and must purchase with cash.

A further detrimental effect of revenue shifting brought about by overly restrictive interest rate ceilings is that it disguises the actual cost of credit. Much of the consumer credit legislative and regulatory activity of the past 10 years has focused upon disclosure and greater consumer awareness of the real cost of credit. Interest rate ceilings, which force lenders or merchants to utilize one or more of the techniques identified above, cause the cost of credit to be disguised making it simply unavailable to even informed credit purchasers.

## 2. *Low Rate Ceilings Decrease The Availability of Credit.*

The second possible result of unrealistically low rate ceilings that cannot either legally or economically be avoided as just described, is that the availability of credit to consumers will diminish, with less credit-worthy consumers being denied credit altogether or particular types of higher risk loans just not being made. *NCCF Report* at 147-49. Once a particular rate ceiling has been established, the question then for the lender is how many consumers have a credit rating that economically justifies a loan with an interest rate at or below the ceiling. For legislators considering rate ceilings, the social and political choice is not solely between a "fair" interest rate and an unfair one for everyone that wants credit; the choice is between the number of consumers that will be able to obtain legal credit at each of the rates under legislative consideration. Those who are denied credit from legitimate lenders may be forced to obtain credit from

any available lender, thus perpetuating the reprehensible practice of loan sharking.

The financial impact upon individual consumers and communities as a whole brought about by the hodgepodge of state interest limitations has been analyzed empirically. Most notable among the studies have been those concerning (and questioning) the 10 percent constitutional usury limitation in the State of Arkansas, made applicable to all forms of credit in the state by the Arkansas Supreme Court's decision in *Sloan v. Sears Roebuck & Co.*, 228 Ark. 464, 308 S.W.2d 802 (1957). See, *An Empirical Study of the Arkansas Usury Law: "With Friends Like That ..."*, 1968 U. Ill. L. F. 544; Mitchell, *Usury in Arkansas*, 26 Ark. L. Rev. 263 (1972); and Credit Research Center, Purdue University, Monograph No. 2, *Credit Policies and Store Locations in Arkansas Border Cities: Merchant Reactions to a 10 Percent Finance Charge Ceiling* (1976). The conclusion of the commentators is that retailers in Arkansas compete at a disadvantage with out-of-state merchants and that credit-worthy consumers are being eliminated from the market.

Thus, much of the evidence that has been compiled to date on the efficacy of usury laws suggests that they have done the consumer more harm than good. Professor Johnson put it this way:

The alleged purpose of rate ceilings has been to achieve a "fair" price to consumers, or a "fair" return to credit grantors. But the great variations among consumers and credit grantors force us to rely upon the effectiveness of shopping by consumers and competition among credit grantors to attain a price that is fair to both parties. The best that rate ceilings can do is to nip the unconscionable transactions which result from joining of an

unwary or desperate consumer and an avaricious credit grantor. The worst that rate ceilings can do is to distort the market for legal credit, so that consumers are thrust into the hands of illegal lenders.

Johnson, *Regulation of Charges*, 66 Mich. L. Rev. at 113.

Therefore, the answer to economic judgments about the availability and price of the commodity money, lies not in rate ceilings but in a competitive credit market that will in itself assure that consumers pay reasonable rates for the use of money. That is not to say that the credit market is perfect or that all rate ceilings should be immediately removed. Realistic rate ceilings do protect against interest rates completely out of line with economic justification. And, as pointed out by the National Commission on Consumer Finance, rate ceilings should not be eliminated altogether in all areas until workably competitive, less concentrated markets exist so far as lenders are concerned. *NCCF Report* at 147-49. Nevertheless, high rate ceilings which allow active rate competition should be the goal, not the fixing of relatively low, non-competitive rates which discourage the entry of new credit extenders into the market.

The National Conference of Commissioners on Uniform State Laws in adopting the 1974 Final Draft of the Uniform Consumer Credit Code said in the Prefatory Note to the Code that "[i]n advocating primary reliance on the marketplace to control the price of credit, the National Conference has recognized the fundamental importance of competition to permit market forces to operate most effectively, a recognition consistent with the conclusions of the National Commission

on Consumer Finance." [1974] Cons. Credit Guide (CCH) Issue No. 315 at xv. In the Comment to the first finance charge section of the Code, § 2.201, the National Conference said the Code's purpose was to "set ceilings and not to fix rates" and "to provide even more effective competition." *Id.* at 69. As shown below, the past 15 years have brought a credit market that is responsive to supply and informed consumer demand, and the price controls of state usury laws hinder, rather than help, those advances.

**C. Competition In The Credit Market, Not Price Controls, Assures The Fairest Treatment Of Consumers.**

Two reasons traditionally have been cited to justify low interest ceilings, despite the obvious dislocations and distortions which result. They were that there was generally very little consumer awareness as to the cost of credit and that there was a lack of competition among potential lenders. The end result, asserted the proponents of usury limits, was that society could not depend on so imperfect a market to set a "fair" price for money, but instead should turn to price controls. That state of affairs just does not exist today. The past 15 years have demonstrated beyond reasonable question that an effective credit market mechanism now exists in consumer lending.

The available data<sup>\*</sup> indicate that there is widespread consumer awareness of the cost of credit due to a general increase in consumer awareness and, specifically in credit areas, the emergence of widespread and uniform disclosures mandated by the Truth in Lending Act, which became effective on July 1, 1969. 82 Stat.

<sup>\*</sup> See, e.g., Johnson, *Regulation of Charges*, 66 Mich. L. Rev. at 89-97; and *NCCF Report*, Chs. 7, 10.

146. See Senate Comm. on Banking, Housing and Urban Affairs, Truth in Lending Simplification and Reform Act, Report No. 95-720, 95th Cong., 2d Sess. 1-3 (1978). In addition, the recent growth of competition within the lending industry and the expansion of the credit sources available to the consumer (*e.g.*, bank credit cards and credit unions)<sup>7</sup> mean that there is little evidence of any substantial monopoly element on the supply side of the consumer credit industry. Further, to the extent that there are pockets of lender concentration in some states, the concentration may well be the product of low rate ceilings that effectively preclude new entrants into the credit market. Competition—not price control—is the key to a consumer credit market that fairly advances the interest of consumers, of lenders, and of the economy as a whole.

When these principles are considered in light of the decision of the Supreme Court of Minnesota and the contrary arguments of the Petitioners, one thing becomes vividly clear: the stated policy reasons for a reversal of the decision below are simply devoid of rational support. For example, the argument is advanced that the Minnesota statute involved here reflects a clear legislative policy of the State of Minnesota to protect its people from interest rates in excess of 12%. This is not so for at least two reasons. First, while the Minnesota legislature has supposedly provided the consumer with protection of 12% plus \$15 in one part of its statute book (§ 48.185), in another part (§ 56.13) it has said it is perfectly all right for a small loan company to charge that same consumer 33% on the first \$300 of a consumer loan, 18% on the next \$300, and

<sup>7</sup> NCCF Report, Ch. 2.

15% on the next \$600 for a composite rate of 21.3% on the first \$1000. See Brief for Respondent in Opposition to the Petition for Writ of Certiorari, Appendix at 2.

Second and more important, the Petitioners are asking this Court to *assume* as the key policy justification for a reversal of the decision below that a Minnesota consumer will pay less interest under a bank card program run by a Minnesota bank than the consumer will pay under the Nebraska bank card program under attack. In fact, the record in this case simply does not allow the Court to make that, or any other evidentiary assumption.

What is known is that approximately one-quarter of retail card holders and one-third of bank card holders pay no interest charges at all.<sup>8</sup> For those bank card consumers, the Minnesota statute relied upon by the Petitioners gives the Minnesota consumer *less* “protection” from finance charges than does the Nebraska statute that does not allow for any annual service charge. As a result, at least 33% of all those participating in the plan offered under Nebraska rates would actually pay less than they would if they had participated in the program of the Petitioner Marquette National Bank or any other program which included an annual service charge.

Furthermore, if the permissible \$15 annual service charge is assessed, the effective rates charged by Min-

<sup>8</sup> R. Shay & W. Dunkelberg, *Retail Store Credit Card Use In New York* 73 (1975); W. Dunkelberg, Credit Research Center, Purdue University, *The Economic Effects Of Effective Rate Ceilings* 16, 22 (1978), *The Transfer Implications Of Consumer Credit Regulation* 12, 30 (1977), and *Credit Cards and Revolving Credit: Retrospect and Prospect* 5-6 (1976) (unpublished manuscripts).



nesota banks on deferred balances of less than \$200 exceed the effective rates charged by Nebraska banks. For the consumers who have an average balance of \$200 or less, estimated in California to be 47% of all card holders,<sup>9</sup> there is again *less* "protection" under the Minnesota statute.

Thus, the Petitioners are asking the Court to speculate in an evidentiary vacuum that the effective interest rate for consumers who pay interest at the Nebraska rate is greater than if interest is assessed at the Minnesota rate. Indeed, the contrary is true.

Even if, for the sake of argument, it were assumed that the Petitioners are correct—that the evidentiary vacuum now has been filled with evidence that the cost to consumers is greater under the Nebraska rate provisions than under those of Minnesota—then the Court is faced with a somewhat puzzling argument by the Petitioners that someone who is allegedly charging a *higher* interest rate is competing unfairly with the entity charging a lower rate! Put in its most basic terms, the Petitioner Marquette National Bank urges this Court to find, without any supporting data, that a *more costly* charge program has a "substantial, illegal, competitive advantage over petitioner." Petition for Writ of Certiorari at 22.

Common sense and the data concerning consumer awareness of interest rates make that argument implausible at best. A recent study has shown that awareness of interest rates among holders of bank credit

<sup>9</sup> W. Dunkelberg and R. Johnson, Credit Research Center, Purdue University, *CRC's Western Bank Card Study* 10, Ex. 17 (1978) (unpublished manuscript). This study reveals that 47% of bank credit card holders have average unpaid balances of \$200 or less.

cards is 80 percent.<sup>10</sup> If the Petitioners are correct that the Nebraska interest is higher, then there is no rational reason why a Minnesota bank charging a *lower* rate cannot compete successfully for the business of Minnesota consumers without the judicial protection of this Court. What the market place calls for is open competition, the end result of which is less expensive and more available credit to all consumers—not price controls that thwart competition and perpetuate monopolies of the type apparently sought by Petitioner Marquette National Bank.

**D. The Multi-State Credit Market Would Be Severely Damaged By A Reversal Of The Decision Below.**

A more national perspective, rather than the state approach advocated by the Petitioners, is what is called for at a time when many borrowers and lenders are engaged in multistate commerce. Merely to state a few of the statistics confirms what virtually all consumers know from personal experience: credit cards and revolving credit have become one of the major components of retail commerce in the United States.<sup>11</sup> For example, over 60% of all families use at least one credit card. In 1975, consumers used an estimated 330 million such accounts.<sup>12</sup> Large retailers estimate that over half

<sup>10</sup> W. Dunkelberg, Credit Research Center, Purdue University, *The Economic And Distributive Effects Of Credit Regulation* 19-23, Table 15 (1977) (unpublished manuscript).

<sup>11</sup> For discussions of credit card use and its importance to our economy, see, R. Shay & W. Dunkelberg, *Retail Store Credit Card Use in New York* (1975); and G. Katona, et al., *Survey Research Center, University of Michigan, 1970 Survey of Consumer Finances* (1971).

<sup>12</sup> W. Dunkelberg, Credit Research Center, Purdue University, *The Economic Effects Of Effective Rate Ceilings* 5, 23 (1978) (unpublished manuscript).

of their sales volume is charged on a credit card (although a much lower proportion involves revolving credit).<sup>13</sup> At the end of 1976, estimated outstanding revolving credit balances amounted to \$30 billion, revolving credit alone making up about 15% of total consumer credit outstanding.<sup>14</sup> Revolving credit card accounts financed an estimated \$80 billion in sales in 1974.<sup>15</sup>

These are economic considerations that bear upon the decision under review by the Court. Involved in this case is a national credit market, not one confined to the boundaries of Minnesota. The case presented here is a decision by the Minnesota Supreme Court that in effect confirms time-honored principles of allowing national banks to engage in interstate transactions and to rely upon a single rate not subject to the limitations imposed by one particular state. The decision below advances interstate commerce, competition and the economy. To accept the Petitioners' argument that commerce is somehow jeopardized by a Nebraska national bank, assumed to be charging a higher interest rate than a competing Minnesota bank, is to ignore economic reality. If the Minnesota national bank wants or needs to increase its rate of interest and thereby extend credit to a greater number of consumers, it can. But, there is no reason under the law or under the principles of a free economy to deny such a decision already made by the Nebraska bank. On the other hand, Minnesota consumers are

<sup>13</sup> W. Dunkelberg, Credit Research Center, Purdue University, *The Transfer Implications Of Consumer Credit Regulation* 14 (1977) (unpublished manuscript).

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.*

entitled to choose among competing lenders and make their own personal decisions based on the available supply (and cost) of credit. A reversal of the decision below would be economically contrary to such an informed and reasoned decision-making process.

**IV. EVEN IF THIS COURT WERE TO DECIDE THAT IN THIS CASE SECTION 85 INCORPORATES MINNESOTA RATHER THAN NEBRASKA INTEREST RATES, NEITHER MINNESOTA NOR NEBRASKA NATIONAL BANKS WOULD BE BOUND BY THE RESTRICTIVE INTEREST RATE IMPOSED BY MINN. STAT. § 48.185.**

**A. Minn. Stat. § 48.185 Is Precisely The Type Of Statute Congress And Tiffany Anticipated When Expressing Concern About The Treatment Of National Banks.**

Minn. Stat. § 48.185 provides for credit card loans and limits the rate of interest which *banks and savings banks* can charge on open-end revolving credit card transactions to 12%. The Petitioners contend that the rate of interest any national bank may charge is limited to the "nondiscriminatory" rate established by Minnesota law for state banks and savings banks, and since national banks fall within the purview of this "nondiscriminatory" statute, they argue that national banks are not allowed to charge the higher interest rates allowed by Minn. Stat. § 56.13.

As a threshold matter, it must be emphasized that the rates actually being *charged* by national banks in Minnesota have no bearing on the rates which they are *allowed* to charge.<sup>16</sup> While Minnesota national banks

<sup>16</sup> While not an issue here, The Association believes that a national bank may charge the interest rate specified for the most favored lender in the state where the national bank is located or where the loan is made, whichever rate is higher. Thus, if a Minne-

do not currently charge the higher rate allowed under their most favored lender status, that fact has no relevance to the rate allowed to a Nebraska national bank. All national banks are empowered to charge most favored lender rates. Since certain Minnesota interest rates are higher than the Nebraska rates, the alleged disparity which exists between the interest rate *allowed* to Minnesota and Nebraska national banks is illusory. The attempt by Minnesota to restrict either interstate or intrastate national banks by a facially "nondiscriminatory" statute which is discriminatory in effect is in clear violation of the "most favored lender" rule.

Restricting national banks to the interest rate permitted for state banks is *precisely* the result that Congress, in drafting Section 85, and the courts, through *Tiffany* and its progeny, sought to avoid. The reference in Section 85 to the "rate allowed by the laws of the State" does not limit national banks to the rate of interest allowed to state banks, but was meant to include *any* exceptions to that rate established for special transactions or special classes of lenders. See Part I of this Brief. Congressional concern centered on state action that would place national banks at a disadvantage as to any state lender. The example most feared was that the states would adopt low rate ceilings for *state* banks, thus unreasonably restricting national banks. It was for that specific purpose that national banks

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sota national bank with a bank card program made a loan to a Nebraska consumer, the Minnesota bank could charge interest computed by the Minn. Stat. § 56.13 or the Nebraska rate under attack here. The Association understands, however, that this issue is not before the Court.

were allowed to look beyond the limits imposed on state banks.

This conclusion is directly supported by this Court's analysis in *Tiffany*:

[Section 85] speaks of allowances to national banks and limitations upon state banks, but it does not declare that the rate limited to state banks shall be the maximum rate allowed to national banks. . . . [I]f such associations were restricted to the rates allowed by the statute of the State to banks which might be authorized by state laws, unfriendly legislation might make their existence in the state impossible. . . . The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. . . . [Section 85] gives advantages to national banks over their state competitors. It allows such banks to charge such interest as state banks may charge, and more, if by the laws of the state more may be charged by natural persons.

85 U.S. (18 Wall.) at 412-13 (Emphasis added).

Both legislative intent and judicial construction make clear that national banks are not limited to the interest rates established by Minn. Stat. § 48.185.

**B. Minnesota Intentionally Created A Class Of Favored Lenders Of Consumer Credit, And All National Banks Can Charge Equal Rates As Most Favored Lenders.**

The Petitioners argue that the purpose of Minn. Stat. § 48.185 is to protect Minnesota residents from excessive interest charges. This assertion is incredi-



ble when viewed in light of the rates expressly permitted to other Minnesota lenders. The righteous indignation and outrage expressed at the interest rate assessed in the program operated by the Respondent (18% per year on the first \$999 and 12% per year on amounts of \$1,000 or more) is totally out of place when held up to Minn. Stat. § 56.13 which authorizes small loan companies to charge interest at a rate of 33% on the first \$300 of a consumer loan,<sup>17</sup> 18% on the next \$300, and 15% on the next \$600, for a composite rate of 21.3% for the first \$1,000.

The specific statutory recognition of the propriety of a maximum interest rate of 21.3% on a \$1,000 extension of credit, renders patently absurd the argument that Minnesota must erect a wall against interstate credit in order to protect its citizens from a "usurious" interest rate of 18%.

Because Minnesota has in effect made small loan companies favored lenders under state law, all national banks are allowed to charge as much as this favored lender of consumer credit. Pursuant to *Tiffany*; *United Missouri Bank of Kansas City v. Danforth*, 394 F.Supp. 774 (W.D. Mo. 1975); and *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972), all national banks are entitled to utilize the interest rates allowed to the most favored lender of consumer credit, notwithstanding the rates permitted to state banks under more restrictive state statutes. As described above, the principal purpose of Section 85 is to anticipate and

<sup>17</sup> As disclosed in the text accompanying footnote 9 above, in California the percentage of cardholders having an average balance of \$200 or less is estimated to be 47%.

defeat state legislation which purports to give any state lender advantages over national banks. *Tiffany*.

*Danforth* analyzed a Missouri Retail Credit Sales Act that provided maximum interest rates for credit sales which were generally lower than those permitted under the Missouri Small Loan Act. In its decision, the court assumed that the national bank's transactions were within the more restrictive Retail Sales Credit Act, and it recognized that state banks would be limited to the act's restrictive interest rates. Despite these factors, however, the court held that the most favored lender status of national banks would allow them to charge the higher rate applicable under the Small Loan Act. The court stated that it was irrelevant to a determination of a rate permitted to national banks under Section 85 that competing lenders are not actually charging the highest rate permitted, and it was also irrelevant that competing state lenders were not engaging in the same particular type or class of loan or credit transaction as national banks:

The important determination is whether competing state licensed or chartered lenders *may* engage in the particular type or class of loan, and the rate of interest they *may* charge in connection therewith. Whether chartered banks will enjoy parity of interest regulation with national banks on similar or identical loan or credit transactions is, under operation of Section 85 of Title 12, left to the state to decide by the enactment of legislation relating to the classification of lenders and interest rates permitted to those classes. . . . Missouri has in effect made small loan companies licensed under that Chapter "favored lenders" in the class of debt encompassed by

the Retail Credit Sales Act. Plaintiffs, as national banks, are entitled to parity of interest charges with these lenders, notwithstanding the rates permitted to state chartered banks. To hold otherwise would be contrary to the congressional policy of assuring national banks parity with most favored state lenders and frustrate one of the primary objectives of the National Banking Act—competitive state-federal equality.

394 F.Supp. at 784-85. (Emphasis by the court.)

The court held that national banks could charge the higher rates of interest authorized by the Small Loan Act on debt incurred under bank credit card operations, and were not limited to the provisions of the Retail Credit Sales Act. The court also indicated that the doctrine of competitive state-federal equality is a competitive equality between national banks and the most favored lender under state law, and not a competitive equality between national banks and state banks.

Thus the court in *Danforth* recognized that if national banks were forced to adhere to the limits of specific categories of loans, skillful legislative drafting could lead to discrimination against national banks. A similar result was reached in *Northway Lanes*, where a national bank was permitted to charge higher rates allowed to a savings and loan association rather than the restrictive rates allowed banks in the state. Because Minnesota has made small loan companies favored lenders in the state, all national banks are entitled to such higher rates.

Even if Minnesota laws, and not Nebraska laws, were held to apply, the Minnesota statute provides a prime example of the type of statute about which the

drafters of Section 85 were concerned. Having provided disparate treatment for state banks, the State of Minnesota now seeks to subject national banks to that treatment. As vividly demonstrated by the Minnesota small loan company law, there is no public policy which would rail against the 18% rate involved in the Respondent's program. The basic concepts which underlie the National Bank Act, as reflected in Section 85, permit national banks which are subject to Minnesota law to charge the maximum interest rate permitted to *any* lender in the state.

**V. ANY CHANGE IN THE LONGSTANDING INTERPRETATION OF SECTION 85 SHOULD RESULT FROM CONGRESSIONAL RATHER THAN JUDICIAL ACTION. SECTION 85 AS CURRENTLY APPLIED DOES NOT FORECLOSE THE STATE OF MINNESOTA FROM DETERMINING ITS OWN POLICIES.**

**A. If There Is To Be Any Change In Section 85, It Should Be Legislative And Not Judicial.**

If, despite the important national banking system considerations discussed above for a continuation of the existing rule, there is sentiment that the status afforded to national banks for the past 114 years should now be changed, that change should result from legislative and not judicial action.

Since its enactment, Section 85 has been amended several times. *See* Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191; Act of Aug. 23, 1935, ch. 614, § 314, 49 Stat. 711; and Act of Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558. It is important to note that two of those amendments, including the most recent which was in 1974, actually amended the sentence which Petitioners allege contains an ambiguity that requires a radically new interpretation by this Court. In light of the settled judicial gloss that has been applied to Sec-

tion 85, the absence of subsequent Congressional amendment disturbing that gloss and active Congressional involvement in amending not only Section 85, but the actual sentence being considered, a reversal of the uniform interpretation of this provision would seem to infringe upon well-established legislative authority. This section and the sentence being challenged can hardly be said to have been the subject of Congressional neglect.

Indeed, the *specific question* being addressed in this case is the subject of a proposed amendment to the National Bank Act now pending in the United States Senate. On April 20, 1978, apparently in response to the decision below, Senator Wendell R. Anderson, a senator from Minnesota, introduced S. 2964 which would amend Section 85 of the Act in order to bring about the result which Petitioners seek here through judicial construction.<sup>18</sup>

The economic impact of a reversal would be substantial, would disrupt existing national banking operations and would alter the right of national banks to charge interest in interstate transactions. Any change on an immediate basis would cause needless confusion and disruption. This case involves issues which abound with legislative considerations. The development of the banking system has occupied much Congressional time and attention. Both the House of Representatives and the Senate have created committees charged with the continuing responsibility to analyze and fine tune the laws and regulations governing the financial community. Careful economic, competitive and operational

analysis involving this complex system requires fact-finding best left to the legislative branch.

As discussed in Part III, the record below is literally devoid of any data with respect to the amount of interstate credit which would be affected by a change of law in this area. An examination of existing statistical resources suggests that a ready answer to that crucial question simply does not exist.

Accordingly, in reversing the meaning attributed to Section 85 by national banks who relied upon the plain wording of the statute and subsequent judicial and administrative interpretations, large numbers of national banks, which are engaged in interstate transactions, may find themselves with millions of dollars of loans which, although clearly appropriate when made, suddenly have become usurious. Furthermore, although desirable, limiting the application of the Court's interpretation to prospective extensions of credit would fail to recognize the millions of credit transactions which occur on a daily basis. These on-rushing transactions could not, in any reasonable way, be brought to an immediate halt. A legislative rule, on the other hand, would allow for prospective applicability, with at least the possibility of a delayed effective date in order to allow implementation of the newly devised provision.

Moreover, the need to develop meaningful statistical data and the complexities involved in fashioning a reasonable rule to resolve this issue, make the question being reviewed uniquely adapted to resolution by legislation. For instance, if the Court should decide that a national bank is to be bound by a multiplicity of state usury statutes, what incidents attributable to consum-

<sup>18</sup> See 124 Cong. Rec. S6036-6037 (daily ed. April 20, 1978) (remarks of Sen. Anderson).



ers trigger the application of one state statute over another? The instant case, which does not involve any consumers, provides no opportunity for the Court to draw an appropriate line as to the point at which both lender and consumer may look to the law of one state rather than another.

Even though the law, as it appears, may lead to what some believe are undesirable results, that is an insufficient basis to depart from the command of a federal statute. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963). Since the Court should not judicially legislate, *Ebert v. Poston*, 266 U.S. 548 (1925); *Holden v. Stratton*, 198 U.S. 202 (1905); *Keppl v. Tiffin Savings Bank*, 197 U.S. 356 (1905), any change in a doctrine which has been settled for over 100 years and heavily relied upon by virtually all interstate lenders, may most appropriately be resolved by Congress rather than the judiciary.

**B. Nothing In This Decision Prevents A State From Determining Its Own Policies.**

Petitioners argue that the Minnesota Supreme Court decision in some manner takes away the right of a state to determine the policies which affect its citizens. To a limited extent, of course, this is true whenever federal legislation is adopted. The effect here, however, is simply to create a conflict between inconsistent policy choices which the state is fully able to consider and resolve.

In effect, the State of Minnesota is arguing (1) that a 12% interest rate with a service charge of up to \$15 is the highest price its citizens ought to have to pay for credit when obtained from banks, and (2) that there should be interest rate equality between its state

bank lenders and out-of-state bank lenders. These policies, as is the case in many areas, are simply in conflict due to the existence of overriding federal legislation. As a result, a choice must be made as to which policy is the more important. The state, by increasing the interest rates allowed to its state banks, can resolve the second policy concern listed above, although admittedly at the cost of the first. Similarly, it can maintain the interest rates which now apply to state banks, thus satisfying the first policy concern at the cost of the second. In either event, Minnesota is fully able, consistent with federal law, to select its own policy from between conflicting policy alternatives.

**CONCLUSION**

The Association believes that the Supreme Court of Minnesota correctly decided that national banks may charge interest at a rate provided by the law of the state where the bank is located. That result is not only firmly based in clear legal precedent, but it also is supported by sound economic and social policy. The decision of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted,

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

MOTION FILED

OCTOBER TERM 1978

AUG 2 - 1978

No. 77-1258

THE STATE OF MINNESOTA,  
by WARREN SPANNAUS, its Attorney General,  
*Petitioner,*

v.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

No. 77-1265

THE MARQUETTE NATIONAL BANK OF  
MINNEAPOLIS,  
*Petitioner,*

v.

FIRST OF OMAHA SERVICE CORPORATION,  
*Respondent.*

On Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF  
THE FIRST NATIONAL BANK OF CHICAGO  
FOR LEAVE TO FILE BRIEF AMICUS CURIAE

BRIEF OF THE FIRST NATIONAL BANK OF CHICAGO  
AS AMICUS CURIAE

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IN THE  
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*Respondent.*

---

On Writ of Certiorari to the Supreme Court of Minnesota

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**MOTION OF  
THE FIRST NATIONAL BANK OF CHICAGO  
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

The First National Bank of Chicago ("FNBC"), a national banking association located in Chicago, Illinois, moves the Court for leave to file a brief amicus curiae in these cases. The consent of respondent has been obtained; the consent of petitioners has been refused.

FNBC is an issuer of VISA (formerly BankAmericard) credit cards, and more than 400,000 of its cardholders are



residents of states other than the state in which it is located. These non-Illinois cardholders are charged interest at the rate allowable under Illinois law. Since the outcome in this Court may directly and substantially affect FNBC in the future conduct of its business, its interest in these cases is real. Moreover, petitioners seek to overturn the bellwether ruling of the Court of Appeals in *Fisher v. First Nat'l Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), which interpreted Section 85 of the National Bank Act so as to allow national banks to charge interest at rates allowed by the state in which they are located on loans to residents of other states. FNBC was the prevailing party in that case.

Here, respondent is in the position of a bank that has announced its intention to enter into credit card agreements with residents of another state and, as a result, was subjected to petitioners' attempt to enjoin it from going forward with its plans. In contrast, FNBC and many other national banks are now, and have been for some time, charging interest based on the analysis of Section 85 approved by the Court of Appeals in *Fisher*. FNBC thus brings an added perspective to the issues before the Court and will not simply echo respondent's arguments.

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August 2, 1978

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1978

No. 77-1258

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**THE STATE OF MINNESOTA,**  
by **WARREN SPANNAUS**, its Attorney General,  
*Petitioner,*

v.

**FIRST OF OMAHA SERVICE CORPORATION**  
*Respondent.*

No. 77-1265

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**THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,**  
*Petitioner,*

v.

**FIRST OF OMAHA SERVICE CORPORATION,**  
*Respondent.*

---

On Writ of Certiorari to the Supreme Court of Minnesota

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**BRIEF OF THE FIRST NATIONAL BANK OF CHICAGO  
AS AMICUS CURIAE**

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**STATEMENT OF INTEREST**

Chartered in 1863, The First National Bank of Chicago ("FNBC") is one of the oldest national banks in the United



States. It is also a leader in the development of bank credit card systems. FNBC was a founding member of the Midwest Bank Card system in the mid-1960's and later was the first major issuer of BankAmericard (now VISA) cards in the midwest. Today, FNBC has more than one and one-half million VISA accounts. Of these, more than 400,000 are with residents of states other than Illinois, including more than 4,000 with Minnesota residents.

FNBC has always charged a uniform rate of interest and has always used the rate allowed by Illinois law. In 1971, this practice was challenged by an Iowa cardholder, who argued that Iowa law should govern his account. The controversy was fully litigated and, in 1976, the Court of Appeals ruled that the Illinois rate of interest was properly applied. *Fisher v. First Nat'l Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976). This Court declined to review that decision. 429 U.S. 1062 (1977).

The decision in *Fisher* is central to the issues raised in the present case. Specifically, petitioners seek to undercut *Fisher* by arguing, in part, that the National Bank Act was never intended to apply to interstate loans, a point which was taken for granted in *Fisher*.

FNBC has a real interest in preserving the vitality of the *Fisher* ruling. To change from a system using a single, uniform rate of interest to one applying the rate of each state in which a cardholder resides would be costly and needlessly so. But, more importantly, such a result would serve only parochial interests and defeat both the letter and the spirit of Section 85 of the National Bank Act.

### SUMMARY OF ARGUMENT

*Fisher v. First Nat'l Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), correctly decided that a national bank may lawfully charge the rate of interest allowed by the state in which the bank is located, *i.e.*, the state in which its principal office is found. "Located" as used in the National Bank Act has always been interpreted to refer to the location of the bank offices, and never to mean the residence of customers.

The application of Section 85 cannot be limited to intrastate loans. Contrary to petitioner's assertions, interstate bank transactions were common in the nineteenth century. It is inconceivable that in 1864 Congress intended to regulate only an aspect of *intrastate* commerce, while leaving the regulation of comparable *interstate* commerce to the several states.

The Conference of State Bank Supervisors, as *amicus curiae*, urges the Court to overrule *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1874). Since that issue is not raised by the parties, it should not be even considered by the Court. But in no event should *Tiffany* be overruled. There is no general purpose in the National Bank Act to maintain equality between national and state banks in all respects. In some respects national banks are clearly favored over state banks; interest rates are one example. The unanimous opinion of the Court in *Tiffany* was virtually contemporaneous with the legislation, has been repeatedly followed by later courts and the Comptroller of the Currency, and has never been altered by Congress despite numerous revisions of the National Bank Act and Section 85.

Finally, if the Court were to overrule *Fisher*, the decision should not be retroactive, since that would unfairly ex-

pose banks that relied on *Fisher* to claims of usury. Overruling *Fisher* would establish a new principle of law that could not have been anticipated by those banks, and retroactive application would not further the purpose of Section 85, which is to give national banks guidance as to the interest rates they may charge.

## ARGUMENT

### I. SECTION 85 OF THE NATIONAL BANK ACT APPLIES TO INTERSTATE LOANS.

Petitioners argue that Section 85 of the National Bank Act does not apply to loans made by a national bank to residents of another state (Marquette Nat'l Bank Br. at 12, 18, 28-32) and that the "plain language" of Section 85 should simply be ignored. (State of Minnesota Br. at 28-20). Understandably, neither petitioner disputes that, if Section 85 applies and is read "plainly," it means that a national bank may lawfully charge the rate of interest allowed by the state where the bank is located on out-of-state loans. Nor do petitioners dispute that a national bank is located only in the state where its principal office and place of business is located. In its amicus brief, the Conference of State Bank Supervisors ("Conference") argues that a national bank is "located" wherever it transacts business (Conference Br. at 48), an argument swiftly rejected in *Fisher*.

The term "located," which is used throughout the National Bank Act, *e.g.*, 12 U.S.C. §§ 24, 28, 30, 32, 36, 64a, 85, 94, 142, 143, 144, 182, 192, 202, 548, has always been understood to mean the state in which the bank's principal office is found. Thus, in *Bank of America v. Whitney Central Nat'l Bank*, 261 U.S. 171, 172-73 (1923), the Court held that a national bank having its principal office in New Orleans was not located in New York even though it was also doing extensive business in New York. And in *Klein v. Bower*, 421 F.2d 338, 342 (2d Cir. 1970), the Court expressly rejected the contention that a national bank in Scranton was "located" in New York because it did business there through an agent.

The Court's recent decision in *Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35 (1977), makes a narrow exception to the even stricter rule that a national bank is located in the place where its *principal* office is found by permitting venue to lie in districts where the national bank has branch offices, which cannot be in another state. See 12 U.S.C. § 36. That is a far cry from a holding that a bank is located wherever its customers reside—a conclusion that would have eliminated the need for the Court's decision in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). In *Radzanower*, plaintiff sought to use Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, to take advantage of the provision for venue in the district where the defendant "transacts business." The Court held that Section 27 did not apply to actions against national banks and that venue was covered by Section 94 of the National Bank Act, 12 U.S.C. § 94. If the place where a national bank is "located" were deemed to be any place it transacts business (in the sense of the places where its customers reside), Section 94 would be as broad as Section 27, and *Radzanower* would have been a meaningless exercise.

Given the long line of decisions rejecting contentions that a national bank was located in a different state from that of its principal office, *e.g.*, *National City Bank v. Domenech*, 71 F.2d 13, 16 (1st Cir. 1934), *aff'd*, 294 U.S. 199 (1935); *Buffum v. Chase Nat'l Bank*, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); *Klein v. Bower*, *supra*; *Helco, Inc. v. First Nat'l City Bank*, 470 F.2d 883 (3d Cir. 1972), the Court in *Bougas* surely did not intend to overrule these decisions *sub silentio*.

#### A. Section 85 Cannot Be Limited to Intrastate Loans.

The notion that Section 85 provides an interest rate only for a national bank's *intrastate* loans apparently was first

advanced in *Meadow Brook Nat'l Bank v. Recile*, 302 F.Supp. 62 (E.D. La. 1969). It was adopted by Judge Heebe with reservations, 302 F.Supp. at 74, only to be followed by the grant of a new trial, vacating the decision. (Order, Nov. 24, 1969). Judge Heebe's reservations were well-founded, for it is inconceivable that in 1864 Congress intended Section 85 to reach *intrastate*, but not *interstate*, transactions.

Although the National Bank Act was denoted "An Act to provide a National Currency," 13 Stat. 99, it has long been recognized that Congress' power to provide for a national banking system derives as well from the power to regulate interstate commerce. *McCullough v. Maryland*, 4 Wheat. 316, 406 (1819). And with the demise of national banks' powers to issue currency, the commerce clause is left as the principal constitutional basis for the National Bank Act. In *Burns v. American Nat'l Bank & Trust Co.*, 479 F.2d 26, 29 (8th Cir. 1973) (*en banc*), the Eighth Circuit held:

"It seems almost elementary that Congress regulates national banks primarily under the commerce clause, and that the National Bank Act, including 12 U.S.C. §§ 85 and 86, is an Act regulating commerce for purposes of § 1337."<sup>1</sup>

Nor is there any basis for petitioners' argument that Section 85 should be limited to intrastate loans because interstate lending and bank credit cards were unknown to the Congress of 1864. First, statutes dealing with broad

<sup>1</sup> Although Congress sometimes restricts laws regulating commerce to interstate transactions (*e.g.*, the Robinson-Patman Act, 15 U.S.C. § 13) and at other times reaches both interstate and intrastate commerce (*e.g.*, the Sherman Antitrust Act, 15 U.S.C. § 1), there is apparently no instance where Congress has attempted to regulate only intrastate transactions and left similar interstate transactions to be regulated by the states.



policies are not limited in their application to the specific mechanisms of the day. See, e.g., *SEC v. W. J. Howey Co.*, 328 U.S. 293, 299 (1946); cf. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 n.16 (1968).

Second, it is untrue that interstate banking was unknown in the nineteenth century. Petitioners portray banks of that period as unsophisticated, local institutions relying entirely on the immediate community for their business and having little intercourse with other financial institutions. This picture is entirely inconsistent with the facts, both as stated by historians of the period and as revealed by the case law that exists on the subject.

Beginning early in the 1800's, the nation's banks developed and followed a wide variety of interstate financing practices aimed at linking the states commercially. The simplest of these practices was the conventional loan on a promissory note. In spite of its paucity, the case law provides a surprising number of examples of such loans. *In re Wild*, Fed. Case No. 17,645 (S.D.N.Y. 1873), arose from a series of loans made by a New York national bank to a Michigan corporation. Likewise, in *Manufacturer's Nat'l Bank v. Baack*, Fed. Case No. 9,052 (S.D.N.Y. 1871), an Illinois national bank, as creditor, sued a New York citizen seeking injunctive relief and the appointment of a receiver. See also *Cadle v. Tracy*, Fed. Case No. 2,279 (S.D.N.Y. 1873) (suit by receiver of an Alabama national bank against a New York national bank); *Farmer's Nat'l Bank v. McElhinney*, 42 Fed. 801 (S.D. Iowa 1890) (suit by Illinois national bank against a citizen of Iowa); *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 641 (1892); *Merchants' & Manufacturers' Nat'l Bank v. Stafford Nat'l Bank*, Fed. Case No. 9,438 (D.Conn. 1877); *First Nat'l Bank of Trinidad v. First Nat'l Bank of Denver*, Fed. Case No. 4,810 (D.Colo. 1878); *First*

*Nat'l Bank v. Forest*, 40 Fed. 705 (N.D. Iowa 1889); and *Orange Nat'l Bank v. Traver*, 7 Fed. 146 (D. Ore. 1881).<sup>2</sup>

Nor were interstate loans uncommon prior to the passage of the Act. In his preeminent work on the history of American banking, Fritz Redlich notes that very substantial interstate loans were made at least as early as the 1820's:<sup>3</sup>

"In the 1820's . . . the Morris Canal and Banking Company, a New Jersey improvement bank which became important as a banking enterprise in the 1830's, needed funds for building its canals. It issued two series of post notes of \$300,000 and \$500,000, respectively, which were bought by the Bank of New York." *F. Redlich, The Molding of American Banking*, Pt. I, 49 (1947) [hereinafter cited as Redlich].

Conventional loans, moreover, were but one of many ways in which the banks of the 1800's engaged in interstate finance. Perhaps even more important was the practice of

<sup>2</sup> Professor James provides another, particularly striking example of an interstate loan from the same period:

"Chicago was the arena of a speculative battle, quite early in the period, that attracted attention from all over the world and had serious repercussions in many parts of the United States. Harper, a prominent operator on the Board of Trade, decided at the end of 1886 to corner the wheat market, and carried on his campaign for months in the face of repeated bear raids and steadily growing visible supplies of grain. Adding to his own fortune the entire resources of the Fidelity National Bank of Cincinnati, and borrowing heavily from banks in all parts of the country, . . ."

C. James, *The Growth of Chicago Banks* 546 (1938) (emphasis supplied).

<sup>3</sup> See also Klebaner, *Commercial Banking in the United States: A History* 31 (1974) [hereinafter cited as Klebaner]; Fenstermaker, *The Development of American Commercial Banking: 1782-1837* 17 (1965) [hereinafter cited as Fenstermaker].

discounting already issued debt obligations.<sup>4</sup> In 1814,<sup>5</sup> state banks began to discount and redeem notes issued by out-of-state banks. The notes of country banks in particular were bought up at a discount by the larger banks when they reached commercial centers and were then sent back to the issuing bank to be paid. The practice extended to notes issued by the larger out-of-state banks as well:

"On behalf of their stockholders and other customers, shortly after having been set up, this bank [the New England Bank] undertook the collection of country notes at cost within and outside the state. . . . At the same time the New England Bank began to specialize in collecting New York notes and in transporting specie thence to Boston, thereby eliminating New York notes from the New England circulation." Redlich, Pt. I, at 69.<sup>6</sup>

In the face of the fact that conventional loans, discounts, and interest payments on demand deposits broached state lines almost from the beginning of the 1800's, petitioners' contention that the National Bank Act did not contemplate interstate loans presses the limits of credulity.<sup>7</sup>

To put the matter to rest, the 1887 amendment to the National Bank Act, 24 Stat. 552, should be considered. By that amendment Congress made it clear that national banks could sue or be sued in federal courts under principles of

<sup>4</sup> Discounting is expressly covered by Section 85 of the Act.

<sup>5</sup> This date marks the point at which banks first became involved in discounting. The practice itself, however, began a few years before among money brokers. See Redlich, Pt. I, at 68.

<sup>6</sup> See also Fenstermaker at 42.

<sup>7</sup> It should not be forgotten that the Second Bank of the United States had, in 1830, no less than 25 branches in 8 cities. It would be difficult to characterize such an institution, which, when it guaranteed bonds, gave them the "impress that was to make them pass in the markets of the world," as either local or unsophisticated. See J. Knox, *History of Banking in the United States* 63, 78 (1900).

diversity jurisdiction. That this question had been disputed for a number of years and that Congress felt it necessary to make specific provision for it indicates that disputes requiring recourse to the courts between national banks and residents of other states were no infrequent matter, and it can only be concluded that most of those disputes must have arisen from interstate banking transactions. See *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 641, 651 (1892).

#### B. The "Plain Language" of Section 85 Should Not Be Ignored.

Minnesota makes the extraordinary argument that the Court of Appeals in *Fisher* should be censured for relying on the plain language of Section 85. (State of Minnesota Br. at 29). Minnesota's reliance on *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9 (1976), is misplaced. *Train* presented the situation of a statutory provision whose words were clear, but if read literally, would have set the Environmental Protection Agency against the Atomic Energy Commission. Moreover, the issue whether "pollutants" under the Federal Water Pollution Control Act included radioactive materials controlled by the AEC had been *explicitly* addressed in the House Committee Report, which stated that they were not included. *Id.* at 11. In these circumstances, the Court looked behind the "plain language."

The more common situation is where such explicit definition is lacking, as in *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945), where the Court held:

"The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

**C. The Court's Decision in *Tiffany* Should Not Be Overruled or Even Considered.**

Petitioners do not ask the Court to overrule its decision in *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1874), and they do not treat it as within the scope of the issues to be reviewed by the Court. (Marquette Bank Br. at 24-28, 37; State of Minnesota Br. at 30). Such overruling is urged in the amicus brief of the Conference of State Bank Supervisors. (Conference Br. at 16-41).

The Conference has filed its brief in these cases not to aid the Court in deciding the question presented by petitioners, but instead to attack *Tiffany*. FNBC submits that this is not the proper time to discuss *Tiffany* in depth and offers the following comments only to indicate that any review of *Tiffany* should await full exploration in an appropriate case.

First, there is no *general* purpose in the National Bank Act to maintain national-state bank equality in all respects. In those areas where Congress has considered equality desirable, such as in branch banking, it has expressly legislated. In other areas, Congress has treated national banks differently. For example, in *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875), the Court held that the penalty for usury provided by the National Bank Act was exclusive of state law remedies even though state law was more severe and state banks would thereby be penalized more heavily than national banks for the same conduct. Similarly, national banks have venue privileges unequalled by state banks. 12 U.S.C. § 94.

Interest rates are another area where Congress chose to favor national banks. If Congress intended that national banks could charge only the rate of interest allowed state banks, it could readily have worded Section 85 to provide

it. Nor can the 1933 amendment providing for the alternate rate of one per cent above the federal discount rate be ignored. The Conference argues that it is meaningless because it is usually below state bank rates. (Conference Br. at 38 n.55). To the contrary, the passage of the 1933 amendment contemplates instances when one per cent above discount will exceed state rates and demonstrates Congress' willingness to allow national banks to charge higher rates than state banks.

Second, the fact that Congress has never amended Section 85 to reverse *Tiffany* cannot be ignored. *Tiffany* is no ordinary interpretation of a statute. The decision was almost contemporary with the passage of the Act. Justice Strong, who wrote the opinion in *Tiffany*, and Justice Clifford had served in the House of Representatives before the Civil War and were therefore familiar with the workings of the legislature. Marquis, *Who Was Who in America 1607-1896* at 111, 513 (1963). Justice Bradley in the 1860's was a close observer of federal legislation involving commerce and has come to be recognized as one of the foremost experts in the field. See generally Note, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 Harv. L. Rev. 977 (1941). The Court in *Tiffany* declared that it understood Congress' intent in enacting Section 85, 85 U.S. at 412-13, and again in *Farmers' & Merchants' Nat'l Bank v. Dearing*, *supra*, stated:

"There was reason why the rate of interest should be governed by the law of the state where the bank is situated. . . ." 91 U.S. at 35.

That the Court in such cases as *Helvering v. Hallock*, 309 U.S. 106 (1940), and *Boys' Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), reconsidered prior statutory interpretations means only that they were exceptional



cases. The general rule is explained by Justice Black in his dissenting opinion in *Boy's*:

"When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this Court owes to the primary responsibility of the legislature in the making of laws. Of course, when this Court first interprets a statute, then the statute becomes what this Court has said it is. See *Gulf, C. & S.F.R. Co. v. Moser*, 275 U.S. 133, 136 (1927). Such an initial interpretation is proper, and unavoidable, in any system in which courts have the task of applying general statutes in a multitude of situations. B. Cardozo, *The Nature of the Judicial Process* 112-115 (1921). The Court undertakes the task of interpretation, however, not because the Court has any special ability to fathom the intent of Congress, but rather because interpretation is unavoidable in the decision of the case before it. When the law has been settled by an earlier case then any subsequent 're-interpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute." *Id.* at 257-58.

The National Bank Act was re-enacted with some revisions in 1874, 18 Stat. 123, but no effort was made by Congress to "correct" *Tiffany*. Furthermore, it cannot be said that all of Congress' disinclination to revise Section 85 antedates significant litigation involving the statute. By 1974, when Section 85 was last amended, the Comptroller of the Currency had issued more than eighty rulings over a forty-year period applying *Tiffany*, *Commissioner v. First Nat'l Bank of Maryland*, 300 A.2d 685, 690-91 (Md. Ct. App. 1973), and had issued a formal regulation incorporating the most-favored lender rule. 12 C.F.R. § 7.7310. And, at the time of the 1974 amendment, *Tiffany* had recently been followed in *Partain v. First Nat'l Bank of Montgomery*, 336 F.Supp. 65, 66-67 (M.D. Ala. 1971), *rev'd on other grounds*, 467 F.2d 167 (5th Cir. 1972), and *Northway Lanes v.*

*Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 861-64 (6th Cir. 1972).

Nor is the development of more complex interest laws or the increase of legislation regarding Section 85 in the past decade of any significance. Given the obvious disinclination of Congress in 1864 to allow states to discriminate against national banks by giving advantageous rights to state banks, there is no basis for the Conference's suggestion that Congress would have been more favorably disposed to states granting advantages to other state-chartered institutions, such as savings and loan associations or finance companies, provided only that they were not called banks.

The long standing acceptance of *Tiffany*, coupled with Congress' failure to reject its interpretation of Section 85, argues significantly against overruling that decision. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975).

## II. IF FISHER SHOULD BE OVERRULED, THE DECISION SHOULD NOT BE RETROACTIVE.

FNBC has relied on the *Fisher* analysis in establishing its interest rates. If the Court overrules *Fisher*, unless such decision were made prospective, FNBC (and numerous other banks that have relied on *Fisher*) will undoubtedly be confronted with class actions seeking penalties under Section 86 of the National Bank Act, 12 U.S.C. § 86.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), the Court addressed the question of retroactivity in civil cases:

"In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling a clear past precedent on which litigants

may have relied, see, e.g., *Hanover Shoe v. United Shoe Machinery Corp.*, *supra*, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections*, *supra*, at 572. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter v. Walker*, *supra*, at 629. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Cipriano v. City of Houma*, *supra*, at 706."

All of the relevant factors would favor prospective application here.

**A. Overruling *Fisher* Would Establish A New Principle Of Law.**

There can be no question that overruling *Fisher* would establish a new principle of law. There are no inconsistent decisions by any circuit, nor in the highest court of any state. Moreover, there is no requirement that the decision overruled be one of the highest court having jurisdiction in order for prospective application to be appropriate. *Chevron*, for example, involved overruling decisions of the Court of Appeals for the Fifth Circuit. 404 U.S. at 107. See also *Anderson v. Santa Anna*, 116 U.S. 356, 362 (1886).

Nor would an overruling decision here be "clearly foreshadowed." The Seventh Circuit's decision in *Fisher* was followed by the Eighth Circuit, *Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977), the Supreme Court of Minnesota, *Marquette Nat'l Bank v. First of Omaha Service Corp.*, 262 N.W.2d 358 (Minn. 1977), and

an Iowa district court. *Iowa v. First of Omaha Service Corp.*, Equity No. CE 3-1300 (Dist. Ct. Iowa, July 6, 1977), 5 CCH Cons. Credit Guide ¶ 97,160.

**B. Retroactive Application Would Not Further The Purpose Of Section 85 And Would Be Inequitable.**

It is clear that the functional purpose of Section 85 is to inform national banking associations of the applicable rules governing their interest rates, i.e., to provide guidelines that banks may rely upon in structuring and conducting their business. As a prescriptive rather than a fundamental rule, Section 85's purpose would not be furthered by retroactive application. See *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

It is well-established that judicial interpretations should seek to avoid, not discover, usury. In *Fahs v. Martins*, 224 F.2d 387 (5th Cir. 1955), the question was whether interest on overdue interest payments would be considered for purposes of the usury laws. Either Florida law, which would consider the interest for purposes of usury, or New York law, which would not, could have been appropriately applied. In choosing to apply the New York law, Judge Tuttle stated:

"[W]ith respect to the question of usury, it may be stated as a well-established rule that a provision in a contract for the payment of interest will be held valid in most states if it is permitted by the law of the place of contracting, the place of performance, or any other place with which the contract has any substantial connection." *Id.* at 397.

Accord, *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407-08 (1927). The rationale behind this validation doctrine is explained in the *Restatement (Second) of Conflict of Laws* (1971):

"A prime objective of both choice of law . . . and of contract law is to protect the justified expectations of the parties. Subject only to rare exceptions, the parties will expect on entering a contract that the provisions of the courts will not apply an invalidating rule to strike down the contract unless the value of protecting the justified expectations of the parties is outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. *Usury is a field where this policy of validation is particularly apparent.*" (§ 203, Comment b; emphasis supplied).

Since there is no public interest that would be served by exposing banks that relied on *Fisher* to claims of usury, any decision of this Court impairing *Fisher* should be prospective only.

### CONCLUSION

For the reasons stated above, the decision of the Minnesota Supreme Court should be affirmed. But if that decision is reversed, the new interpretation of Section 85 should be declared prospective only.

Respectfully submitted,

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